

EXHIBIT D

7/13/2010

Illumina Inc. v. Affymetrix Inc
Attorneys' Eyes Only

John R. Stuelpnagel

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5	By Mr. Costakos	285	5	By: Jeffrey N. Costakos, Esq.	
6			6	777 East Wisconsin Avenue	
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9	NUMBER	DESCRIPTION	9	jcostakos@foley.com	
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<p>1 VIDEO DEPOSITION OF JOHN R. STUELPNAGEL, D.V.M., 1 blame, but Dr. Stuelpnagel is a third-party witness. So 2 taken at 3579 Valley Centre Drive, Suite 300, San Diego, 2 if you could take that into account in your questioning 3 California 92130, commencing on Tuesday, July 13, 2010, 3 and try and be as efficient as possible so we can try to 4 at 10:06 a.m., before Veronica Thompson, CSR 6056. 4 make up for the time that we've lost as a result of the 5 SAN DIEGO, CALIFORNIA, JULY 13, 2010, 10:06 A.M. 5 mix-up, that would be great. 6 7 VIDEOGRAPHER: Good morning. We're on the 8 record at 10:06 a.m. on July 13, 2010, for the videotaped 9 deposition of John Stuelpnagel in the matter of Illumina 10 Incorporated versus Affymetrix Incorporated, Case 11 No. 09-cv-277, consolidated with case No. 09-cv-665. 12 We're taking this deposition at 12 -- I'm 13 sorry -- at 3579 Valley Centre Drive, Third floor, in 14 San Diego, California. 15 My name is Michael Henry, videographer with 16 Digital Evidence Group located at 1299 Pennsylvania 17 Avenue, Suite 1130-E, in Washington, D.C. 18 The court reporter is Veronica Thompson. 19 Would counsel and all present please identify 20 yourselves for the witness -- for the record beginning 21 with the witness. 22 THE WITNESS: John Stuelpnagel.</p>	<p>1 blame, but Dr. Stuelpnagel is a third-party witness. So 2 if you could take that into account in your questioning 3 and try and be as efficient as possible so we can try to 4 make up for the time that we've lost as a result of the 5 mix-up, that would be great. 6 MR. SHULMAN: Okay. 7 BY MR. SHULMAN: 8 Q. Dr. Stuelpnagel, by whom are you currently 9 employed? 10 A. I'm self-employed. 11 Q. In what capacity? 12 A. As an investor and a biotech entrepreneur. 13 Q. And how long have you been self-employed? 14 A. Since April of 2009. 15 Q. And prior to that time, you were employed by 16 Illumina? 17 A. Yes. 18 Q. Since approximately the summer of '98? 19 A. That's correct. 20 Q. And you left Illumina in April of '09? 21 A. That's right. 22 Q. And why did you leave Illumina?</p>
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<p>1 MR. COSTAKOS: Jeff Costakos with Foley & 2 Lardner for Illumina and the witness. 3 MR. SHULMAN: And Ron Shulman from Wilson 4 Sonsini representing Affymetrix. 5 VIDEOGRAPHER: Thank you. 6 Would the court reporter please administer the 7 oath to the witness. 8 JOHN R. STUELPNAGEL, D.V.M., 9 having been administered an oath, testified as follows: 10 11 EXAMINATION 12 BY MR. SHULMAN: 13 Q. Would you please state your full name and 14 residence address. 15 A. John R. Stuelpnagel, [REDACTED], 16 [REDACTED]. 17 MR. COSTAKOS: And before we begin, I just want 18 to reserve the right to read and sign and designate the 19 transcript preliminarily under the protective order as 20 attorneys' eyes only. 21 Also note that we're starting here at 10:07. 22 And I know these things happen. I'm not casting any</p>	<p>1 A. I was transitioning out. I had actually left 2 my managerial responsibilities a year before that, April 3 2008, and I left for a variety of reasons including the 4 fact that I'd accomplished what I wanted to accomplish at 5 Illumina. 6 Q. And what were your goals of accomplishment at 7 Illumina that you believe you had achieved? 8 A. To build a company that had a successful 9 business or businesses that was in still a growth phase, 10 highly profitable, and valued by investors. 11 Q. Okay. 12 A. As well as to create a lot of great jobs for a 13 lot of people. 14 Q. Now, back in 1996 and 1997, you were in 15 business school. Correct? 16 A. I'm sorry. Could you tell me the -- 17 Q. '96 and '97. 18 A. Actually, '95 through -- fall of '95 through 19 the summer -- till the spring of '97. 20 Q. Okay. And while in business school, at least 21 some portion of the time you were employed. Correct? 22 A. I was. So I was employed by a venture capital</p>

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<p>1 firm that had multiple name changes, but essentially 2 started out as Catalyst Partners and then became CW 3 Ventures. And my employment with that organization 4 started in the summer of 1996.</p> <p>5 Q. Okay. And at one point it was called Avalon 6 Medical?</p> <p>7 A. Yes. So Avalon Medical was the predecessor 8 fund to Catalyst Partners, and so they were really all 9 the same people involved.</p> <p>10 And then what happened is CW Group, which is a 11 longstanding firm in New York, asked us to be part of 12 their firm when they were going to go out and raise a 13 [REDACTED] fund. So the entire team said yes, and we 14 literally just changed the name of the --</p> <p>15 Q. Okay.</p> <p>16 A. -- of the organization.</p> <p>17 Q. And you worked with Mr. Larry Bock while you 18 were at CW?</p> <p>19 A. I did.</p> <p>20 Q. Was it just the two of you in the San Diego 21 office?</p> <p>22 A. There was an administrative assistant also.</p>	<p>1 Q. Okay. And when did you first learn of him? 2 A. Well, it would have been the fall of 1997. I 3 had received some communication from a licensing group 4 that was representing Tufts with a licensing officer that 5 I had met previously when he was at Harvard, and he 6 brought to my attention some interesting technology.</p> <p>7 My responsibilities at CW Group are similar to 8 my responsibilities at Catalyst and Avalon, and that was 9 to start new companies from -- primarily from universi- 10 technology. And so this was something that was very 11 interesting to me. And we ended up -- Larry and I ended 12 up going out to meet with the licensing officer as well 13 as Dr. Walt to learn more about his technology.</p> <p>14 Q. And that was in the fall of '97?</p> <p>15 A. That's right.</p> <p>16 Q. Okay. And who was this licensing technology -- 17 I mean, who was the licensing person?</p> <p>18 A. Shameful. I can't -- Peter -- Peter -- Peter. 19 What's Peter's last name? I'm sorry. I'm drawing.</p> <p>20 Q. Okay. And he was with MBRI?</p> <p>21 A. Yes. And there's -- you might run across 22 documents that have MBRI and others that say MBI.</p>
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<p>1 Q. And you were at CW until approximately when?</p> <p>2 A. Summer of 1998.</p> <p>3 Q. And at some point you left CW and joined 4 Illumina?</p> <p>5 A. Yes. It was more of a transition. Officially 6 there's a start date with Illumina, but really started 7 to -- well, as you may know from reading documents, I was 8 instrumental in starting Illumina, and that process 9 started really in the fall of 1997. We incorporated in 10 May of '98, and I was the president and CEO at that time 11 and had an increasing amount -- percentage of my time 12 devoted to Illumina during that fall, winter, spring. 13 And by late spring, I was working all of my energy 14 towards Illumina. My official hire date didn't come till 15 later at Illumina.</p> <p>16 Q. And when you say by late spring, you're talking 17 about the late spring of '98?</p> <p>18 A. That's correct.</p> <p>19 Q. Now, you know Dr. David Walt. Correct?</p> <p>20 A. I do.</p> <p>21 Q. And he's a professor at Tufts?</p> <p>22 A. Yes.</p>	<p>1 They're the same organization. They changed their name 2 dropped an initial or something like that.</p> <p>3 Q. And they were acting as a, for lack of a better 4 term, agent for Tufts?</p> <p>5 A. Yes. I think they represented a number of 6 universities and maybe even hospitals in that 7 northeastern area and -- was essentially the technology 8 licensing arm.</p> <p>9 Q. And you visited Dr. Walt's lab in the fall of 10 '97 with Mr. Bock?</p> <p>11 A. That's correct.</p> <p>12 Q. And was it your visit to Walt's lab in '97 the 13 event that gave you the idea about founding Illumina?</p> <p>14 A. Yes. It wasn't a light switch. It was a 15 process, again, that happened through the fall and winter 16 until we really made the commitment in the spring to 17 start Illumina, but that was the initial meeting that got 18 me interested in what Walt was doing and got me working 19 on the project.</p> <p>20 Q. Okay. And how long did the visit to Dr. Walt's 21 lab in the fall of '97 last?</p> <p>22 A. I don't have perfect recollection of that. I</p>

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<p>1 think it was on the order of a half-a-day-type visit.</p> <p>2 Q. Okay. And what did you see, or what were you</p> <p>3 shown during this visit?</p> <p>4 A. He showed me some of his arrays that he was</p> <p>5 making with fiberoptic bundles and beads and showed me</p> <p>6 some of the data that they had generated with respect to</p> <p>7 those arrays, and his general lab, and met some of his</p> <p>8 grad students.</p> <p>9 Q. Okay. And what, in general terms, did you</p> <p>10 discuss with Dr. Walt and Peter whomever during this</p> <p>11 visit?</p> <p>12 A. A number of things, obviously, concentrating</p> <p>13 first on the technology and how it was differentiated</p> <p>14 from other array technologies. Talked to him about the</p> <p>15 data and also talked to them about what their interests</p> <p>16 were with respect to commercialization of this</p> <p>17 technology, whether they were interested in trying to</p> <p>18 found a company with us de novo or whether they wanted to</p> <p>19 license it to a larger organization.</p> <p>20 Q. And what did you discuss about how this</p> <p>21 technology of Dr. Walt's was different than other array</p> <p>22 technology during this visit?</p>	<p>1 manufacturing problems.</p> <p>2 So what struck me about David's technology is</p> <p>3 it was different. It was an assembled array. You</p> <p>4 actually did your chemistry offline on little beads in</p> <p>5 huge batches. And literally those batch sizes</p> <p>6 represented hundreds of thousands of arrays' worth of</p> <p>7 material. And so all of the chemistry that was done once</p> <p>8 upfront, and then you'd literally assemble the array, and</p> <p>9 so making an array that has very small features was</p> <p>10 trivial. And from a manufacturing standpoint, it seemed</p> <p>11 to me to be a much more robust way to solve the problem</p> <p>12 Q. So as you saw the Walt tech- -- can I refer to</p> <p>13 this as the Walt technology?</p> <p>14 A. Sure.</p> <p>15 Q. As you saw the Walt technology in the fall of</p> <p>16 '97, it included, among other things, a bundle of optical</p> <p>17 fibers?</p> <p>18 A. Correct.</p> <p>19 Q. Okay. And, collectively, those fibers in the</p> <p>20 bundle formed an array?</p> <p>21 A. Yes. In combination with the beads that had</p> <p>22 unique chemistry on them. So it was more of a system</p>
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<p>1 A. What struck me -- and I don't know if it was</p> <p>2 exactly in David's words -- but the fact that this was</p> <p>3 really an orthogonal way to approach making arrays.</p> <p>4 There were a lot of array companies back in</p> <p>5 '97. It was a very hot field, very competitive. A lot</p> <p>6 of big players including Japanese and Korean players that</p> <p>7 wanted to get in this field, and obviously Affymetrix was</p> <p>8 at the time the industry leader, but everybody was trying</p> <p>9 to do the same thing essentially. They had different</p> <p>10 ways of doing it, but what they were trying to do is put</p> <p>11 chemistry in a very, very small area so that they could</p> <p>12 have lots of unique features or sites for the chemistry</p> <p>13 in -- in a small, small area. And so that's the basic</p> <p>14 nature of array.</p> <p>15 And from my perspective, they all suffered the</p> <p>16 same challenge, which is it's very hard to contain liquid</p> <p>17 chemistry in a confined space to attach an oligo, purely</p> <p>18 in that location. And so they were all suffering from</p> <p>19 manufacturing constraints and problems.</p> <p>20 And as they tried to reduce their feature size,</p> <p>21 the size in which they tried to confine the oligo to one</p> <p>22 location, they kept getting into more difficult</p>	<p>1 than that.</p> <p>2 Q. Okay.</p> <p>3 A. It was -- I mean, that was the whole point. It</p> <p>4 was -- it had components to it that you could assemble.</p> <p>5 Q. All right. I'm going to --</p> <p>6 A. Yeah.</p> <p>7 Q. -- take it component by component.</p> <p>8 But the fibers in this bundle formed at least</p> <p>9 an array of fibers?</p> <p>10 A. That's correct.</p> <p>11 Q. And the end of each fiber in the array had a</p> <p>12 small or perhaps tiny well etched into its surface?</p> <p>13 A. That's right.</p> <p>14 Q. And in each well, a small bead was or could be</p> <p>15 placed?</p> <p>16 A. Yeah. Emphasis on "could be" because there was</p> <p>17 a lot of work to be done to develop it to maximum</p> <p>18 efficiency.</p> <p>19 Q. Okay. And to each bead, some form of bioactive</p> <p>20 agent was or could be attached?</p> <p>21 A. Correct.</p> <p>22 Q. And then the bundle with -- of the fibers with</p>

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1 the beads attached was dipped into some sort of solution?	1 agent. And so moving from oligos to other molecules was
2 A. Correct.	2 attractive.
3 Q. Okay. And the solution contained some target	3 There was even an element to the technology
4 analyte of whatever type you're interested in?	4 that we called a nose or a sensing technology where you
5 A. Yup.	5 could look at compounds through fluorescent shifts that
6 Q. Okay. And then after the dipping, the Walt	6 had nothing to do with bioactive agents. So there was a
7 technology would detect whether the bioactive agent on	7 lot of elements to the technology. And I don't want to
8 each bead bound with something in the target analyte.	8 necessarily characterize my interest as just being in one
9 Correct?	9 area.
10 A. Yes. I mean, there are potential steps we're	10 BY MR. SHULMAN:
11 skipping over, but essentially that's the -- that's the	11 Q. Okay. And I take it that your business idea at
12 progression.	12 some point was to found Illumina to commercially exploit
13 Q. Okay. And as you saw the Walt technology in --	13 Dr. Walt's bead and fiberoptic well technology?
14 in the fall of '97, how did Dr. Walt perform the	14 A. Yes. That would be the foundation of the
15 detection step?	15 company, but we weren't satisfied that that had all the
16 A. He had a CCD camera. It was -- well, it was	16 elements.
17 pretty immature technology, pretty basic technology,	17 One of the ways in which I was mentored to
18 where you just had a CCD camera that took a picture of	18 start companies is to not be so technology focused or
19 the opposite end of the fiberoptic bundle --	19 unique technology focused, and so we were really
20 Q. Opposite of the beads?	20 interested in trying to build around that, but that would
21 A. Of the beads.	21 be the base.
22 Q. And --	22 Q. Okay. And is it correct that --
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1 A. So, if you will, I'll call it -- I don't know	1 MR. SHULMAN: You okay?
2 whether you want to call it the proximal end because it's	2 There's an artificiality about depositions --
3 closer to the camera or the proximal -- or the distal end	3 THE WITNESS: Sure.
4 because it's farther away from the beads, but it's the	4 MR. SHULMAN: -- when you speak to the
5 end that didn't have the beads in it. And it was just a	5 reporter.
6 simple off-the-shelf assembly of components built around	6 BY MR. SHULMAN:
7 a CCD camera.	7 Q. As of 1997 when you visited the Walt lab, had
8 Q. Okay. And what the camera would take a picture	8 anyone else yet commercially exploited the bead and
9 of is some fluorescence on the bead side of the fibers?	9 fiberoptic well technology?
10 A. That's right.	10 A. No, I don't believe so.
11 Q. So is it correct that from your perspective,	11 Q. And approximately how soon after your visit to
12 what was interesting about the Walt technology was that	12 the Walt lab did you come up with this idea of forming a
13 you simply had a fiber optic surface with wells in it and	13 company based on the Walt technology?
14 you poured the beads over the surface and they	14 A. Well, that was our whole reason for being out
15 self-assembled into those wells to create this array that	15 there was to evaluate whether we thought this would be
16 you've spoken about?	16 foundation for a new company. It was the only reason I
17 MR. COSTAKOS: Objection to form.	17 was there.
18 THE WITNESS: So that was -- that was one of	18 Q. Uh-huh.
19 the big things that attracted to me -- me to the	19 A. And so I went there with the motivation of
20 technology.	20 evaluating the technology to be satisfactory for starting
21 There were other things, such as the fact that	21 a new company. And that process was, again, a continu-
22 one can use standard chemistry to attach the bioactive	22 process.

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<p>1 As I did some due diligence on the technology, 2 I tried to ask questions like you just asked me about 3 whether anybody else was trying to use beads and wells to 4 form arrays, what the competitive landscape was, you 5 know, and thinking about this from a startup standpoint. 6 So that -- that process, you know, at least a 7 couple of months trying to do some -- some ground work, 8 and then in that process, started to engage the licensing 9 officer to see whether we could license this on terms 10 that would be compatible to starting a company. So there 11 were lots of checkpoints on the way.</p> <p>12 Q. So after you visited Dr. Walt's lab, I take it 13 that you did some due diligence on the technology?</p> <p>14 A. Yes, yes.</p> <p>15 Q. Did you speak with experts in the field?</p> <p>16 A. Yes.</p> <p>17 Q. Who did you speak with in the latter half of 18 '97?</p> <p>19 A. It's gonna be really hard for me to remember 20 all of that because, again, that's 12 years.</p> <p>21 Q. Best you can.</p> <p>22 A. For instance, we talked to George Whitesides at</p>	<p>1 just one second she wants to, I think, arrange her little 2 head gear, yeah.</p> <p>3 Okay.</p> <p>4 MR. SHULMAN: Okay?</p> <p>5 BY MR. SHULMAN:</p> <p>6 Q. Actually, I have in my notes now -- I think it 7 was Peter Williams of MBI?</p> <p>8 A. Peter Williams.</p> <p>9 Q. Okay.</p> <p>10 A. Beautiful. That's him.</p> <p>11 Q. Do you know a Peter Tutulio?</p> <p>12 A. Tutu- -- was it Peter Tutulio or Jeff Tutulio?</p> <p>13 I think it was Jeff Tutulio, and he was sort of Peter's 14 right-hand man at MBRI, and I believe the first name 15 was Jeff.</p> <p>16 Q. Okay. So those were the MBRI guys?</p> <p>17 A. Yes.</p> <p>18 Q. All right. And is it correct that your efforts 19 to license the Walt technology from Tufts was a fairly 20 lengthy process that took about six months?</p> <p>21 A. Yes. So I think we sort of started it -- negotiations in the, I'm going to guess, November '97</p>
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<p>1 MIT. I'll pick out some names that are recognized in the 2 communities, but George Whitesides is a very famous 3 person in biotechnology.</p> <p>4 We spoke to Clark Still, who at the time was a 5 professor at Columbia in chemistry and also very famous. 6 We'd gone and started a company called Pharmacopelia with 7 him previously, and both of those professors knew David 8 Walt and his reputation; so they were good references for 9 us.</p> <p>10 But I would say that I probably talked to close 11 to a hundred plus people in that due diligence process, 12 not just to two.</p> <p>13 Q. Do you recall any other scientific people that 14 you spoke with apart from the two that you've identified?</p> <p>15 A. Again, probably not right at this moment. I'll 16 try to think of some.</p> <p>17 Q. Okay. And you mentioned that you tried to 18 license the technology of Dr. Walt's from or through 19 MBRI. Correct?</p> <p>20 A. Yes.</p> <p>21 Q. Okay.</p> <p>22 MR. COSTAKOS: If you want to just stop for</p>	<p>1 time frame. Could be December.</p> <p>2 It was -- it was a tough negotiation, and I'm 3 guessing again that sometime in the late winter, we 4 reached terms. And then there was still another couple 5 of months after that in which we signed the license 6 agreement. I believe that was the first part of May of 7 1998. So call it six months.</p> <p>8 MR. SHULMAN: Let me ask the reporter to mark 9 as Stuelpnagel Exhibit 1 a copy of what I believe is the 10 Tufts license agreement bearing production numbers 11 Illumina 3071328 through 45.</p> <p>12 (Exhibit 1 was marked.)</p> <p>13 BY MR. SHULMAN:</p> <p>14 Q. I'm not going to condemn you to read the whole 15 thing, but could you identify this, if you can, as the 16 Tufts agreement that you were referring to?</p> <p>17 A. Let me just look for my signature.</p> <p>18 And it has it, so yes, this is the -- the Tufts 19 agreement --</p> <p>20 Q. Okay.</p> <p>21 A. -- for the Walt technology license.</p> <p>22 Q. And this was executed in early May of 1998.</p>

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<p>1 Correct?</p> <p>2 A. Correct.</p> <p>3 Q. Okay. Now, is it correct that during the time</p> <p>4 you were negotiating this Tufts agreement, Exhibit 1,</p> <p>5 MBRI was also negotiating a license to the Walt</p> <p>6 technology with at least AstraZeneca and Beckman Coulter?</p> <p>7 A. Actually, I don't recollect that.</p> <p>8 Now, they might not have told me who they were</p> <p>9 negotiating with. I don't have any recollection of</p> <p>10 AstraZeneca being involved.</p> <p>11 I do have a recollection that David Walt</p> <p>12 presented to Beckman his technology, and also to a</p> <p>13 company called Stratagene that at the time was here in</p> <p>14 San Diego as possible alternatives to the licensing.</p> <p>15 What I don't have any recollection or knowledge</p> <p>16 of is whether they actually got into negotiations with</p> <p>17 those organizations.</p> <p>18 MR. SHULMAN: Well, let me see if I can refresh</p> <p>19 your recollection, if we can mark as Exhibit 2 a copy of</p> <p>20 your trial testimony from the Affymetrix versus Illumina</p> <p>21 case, the prior case from the district of Delaware.</p> <p>22 (Exhibit 2 was marked.)</p>	<p>1 discussions and so negotiating implies terms. So whether</p> <p>2 that was the right response to the term "negotiation,"</p> <p>3 you know, we could debate about whether a discussion is</p> <p>4 negotiation. It's that MBRI was a third party, and they</p> <p>5 weren't telling me exactly what they were doing, and so</p> <p>6 whether they were discussing or negotiating, we're sort</p> <p>7 of splitting hairs, but I want you to know that today I</p> <p>8 don't know whether they were in formal negotiations.</p> <p>9 Q. Okay.</p> <p>10 A. What I do know is that Beckman Coulter and</p> <p>11 Stratagene had been presented the technology by Walt and</p> <p>12 that Walt at least had some discussions with them about</p> <p>13 licensing. Where AstraZeneca came in here, maybe that</p> <p>14 was a brain meltdown on my part or maybe I remembered</p> <p>15 something different back then, but I don't actually think</p> <p>16 it was AstraZeneca. I think it was Stratagene.</p> <p>17 Q. Okay. But you did give this testimony.</p> <p>18 Correct, sir?</p> <p>19 A. That's correct.</p> <p>20 Q. Okay. And you went on to say -- you were</p> <p>21 asked, "Question: Did this influence your strategy or,</p> <p>22 in your mind, your position in these negotiations in any</p>
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<p>1 BY MR. SHULMAN:</p> <p>2 Q. And the cover page is just the cover page for</p> <p>3 the day on which you testified -- and you can turn to the</p> <p>4 page after the blue page. You'll see your testimony</p> <p>5 begins at transcript page 1012. You see that there at</p> <p>6 the bottom?</p> <p>7 A. Yes.</p> <p>8 Q. Okay. And turn to page 1025, if you would,</p> <p>9 please, and let me read the following testimony to you.</p> <p>10 "Question," beginning on line 10, "Do you know</p> <p>11 if MBRI -- I'm sorry -- MBRI was negotiating with anyone</p> <p>12 else at this time that you were negotiating with them on</p> <p>13 the Tufts Walt technology?</p> <p>14 "Answer: Yes. I knew they were discussing</p> <p>15 this technology with AstraZeneca and Beckman Coulter, two</p> <p>16 much larger, obviously, companies out in California."</p> <p>17 Did you give that answer --</p> <p>18 A. Yeah --</p> <p>19 Q. -- to that question?</p> <p>20 A. -- but, you know, the best I can think today is</p> <p>21 that I misspoke. First, the part about negotiating, I</p> <p>22 don't know if they were actually negotiating or in</p>	<p>1 way?"</p> <p>2 And your answer was, "Absolutely. When you're</p> <p>3 in a competitive negotiation position, you have to be</p> <p>4 cognizant of the fact that you could lose a negotiation.</p> <p>5 So you're much more compliant in terms of trying to meet</p> <p>6 a compromise position with respect to the terms."</p> <p>7 Did you give that testimony, sir?</p> <p>8 A. Appears I did.</p> <p>9 Q. Okay. And how did your compliance manifest</p> <p>10 itself in terms -- in terms that were ultimately agreed</p> <p>11 to in the Tufts agreement?</p> <p>12 MR. COSTAKOS: Objection. Form.</p> <p>13 THE WITNESS: Actually, I don't know in the</p> <p>14 context of which I answered that question. The bottom</p> <p>15 line is that we were in a negotiation with MBRI and I did</p> <p>16 the best I could in term to terms with -- with MBRI on</p> <p>17 behalf of Illumina.</p> <p>18 BY MR. SHULMAN:</p> <p>19 Q. Okay.</p> <p>20 A. So that's -- that's...</p> <p>21 Q. Now, under the Tufts agreement, Illumina is</p> <p>22 required to pay royalties to Tufts. Correct?</p>

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1	A. That's right.	1	MR. COSTAKOS: Okay, sure.
2	Q. Okay. And apart from the monetary royalties	2	BY MR. SHULMAN:
3	that Illumina is required to pay Tufts under the	3	Q. Is it correct that acquiring the rights to the
4	agreement, was Illumina obligated to provide Tufts with	4	Walt technology pursuant to this license agreement is
5	any other consideration -- monetary consideration for the	5	what enabled Illumina to go forward as a company?
6	licenses granted under the agreement?	6	A. I think that's true.
7	MR. COSTAKOS: Objection. Form, foundation.	7	Q. Is it fair to say that had you been
8	THE WITNESS: Try -- can I look at the license	8	unsuccessful in acquiring the rights to Dr. Walt's
9	agreement --	9	technology, Illumina would not be in the business that
10	BY MR. SHULMAN:	10	is in today?
11	Q. Of course. Absolutely.	11	MR. COSTAKOS: Objection. Form.
12	[REDACTED]	12	THE WITNESS: I think that's true, too.
13	[REDACTED]	13	BY MR. SHULMAN:
14	[REDACTED]	14	Q. Now, is it correct that one of the most
15	[REDACTED]	15	important terms in the Tufts agreement is that the
16	[REDACTED]	16	license granted to Illumina for the Walt technology is
17	[REDACTED]	17	MR. COSTAKOS: Objection. Form.
18	[REDACTED]	18	THE WITNESS: I think that's very important,
19	[REDACTED]	19	too.
20	[REDACTED]	20	BY MR. SHULMAN:
21	[REDACTED]	21	[REDACTED]
22	[REDACTED]	22	[REDACTED]
Page 30		Page 31	
1	[REDACTED]	1	[REDACTED]
2	[REDACTED]	2	[REDACTED]
3	[REDACTED]	3	[REDACTED]
4	[REDACTED]	4	MR. COSTAKOS: Objection. Form.
5	[REDACTED]	5	[REDACTED]
6	[REDACTED]	6	[REDACTED]
7	[REDACTED]	7	[REDACTED]
8	(Telephone rings.)	8	[REDACTED]
9	BY MR. SHULMAN:	9	BY MR. SHULMAN:
10	Q. Okay. Now, is it correct that acquiring the	10	[REDACTED]
11	rights to the core Walt technology pursuant to this	11	[REDACTED]
12	license agreement is what enabled Illumina to go forward	12	[REDACTED]
13	as a company?	13	[REDACTED]
14	MR. COSTAKOS: I'm sorry. Wait. Can you read	14	[REDACTED]
15	that? I was distracted.	15	[REDACTED]
16	MR. SHULMAN: Sure.	16	[REDACTED]
17	MR. COSTAKOS: Is that your phone that's	17	[REDACTED]
18	ringing?	18	[REDACTED]
19	MR. SHULMAN: No.	19	[REDACTED]
20	MR. COSTAKOS: Trying to figure out whose	20	[REDACTED]
21	phone. Could you read that back?	21	[REDACTED]
22	MR. SHULMAN: I'll just repeat it.	22	[REDACTED]

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1

MR. COSTAKOS: Objection. Form.

8

16 MR. SHULMAN: Okay. Let me see if I can
17 refresh your recollection.
18 Would you please mark as Exhibit 3 a copy of a
19 deposition of Dr. Stuelpnagel from the Affymetrix versus
20 Illumina case.
21 (Exhibit 3 was marked.)

22 BY MR. SHULMAN:

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1 MR. COSTAKOS: Objection. Form.
2 THE WITNESS: And I actually think it's
3 consistent with our discussion today.

4 BY MR. SHULMAN:

5 Q. The question was, did you give the testimony,
6 sir?

7

15

Q. Right.

16 Now, during your tenure at Illumina, which
17 products sold by Illumina incorporated the Walt
18 technology?

19 A. The arrays.

20 Q. Okay. There's a product known as the bead
21 array product?

22 A. There's a technology known as the bead array

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1 Q. Would you please turn to the page that has
2 production No. 3072200 on the bottom right?

3 A. I'm sorry. What was the number?

4 Q. 3072200.

5 And beginning at page 270 of the transcript at
6 line 17, let me read question and answer.

7 A. I'm sorry. I'm having trouble finding it.

8 Q. 270, line -- I'll give you the line number.

9 Line 17.

10

21 Did you give that testimony, sir?

22 A. Yes.

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1 technology.

2 Q. Okay. I'm sorry.

3 There's a product within the bead array
4 technology known as the Sentrix BeadChip?

5 A. Yes. So Sentrix was a name -- I don't know
6 if -- I think it was a -- my memory is not perfect.

7 Sentrix was a trademark that we used for a
8 little while, particularly around the array matrix. And
9 I think it continued to be around the BeadChip, but we
10 eventually just dropped it. So I'm not quite sure when
11 we dropped the --

12 Q. Okay.

13 A. -- the use of that trademark.

14 Q. But in the array area --

15 A. In the array area, things labeled "Sentrix"
16 would include the Walt technology.

17 Q. Okay. And the particular formats within the
18 array Walt technology that were turned into products were
19 the BeadChip and the ArrayMatrix?

20 A. Yes.

21 Q. Okay. And I read in the 10K for the fiscal
22 year that ended in January of this year that in late 2009

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<p>1 Illumina announced that it would no longer be selling the 2 ArrayMatrix product. Are you aware of that announcement?</p> <p>3 A. I am aware of that announcement.</p> <p>4 Q. Okay. To your knowledge, why has Illumina 5 discontinued sales of its ArrayMatrix product?</p> <p>6 MR. COSTAKOS: Objection. Form.</p> <p>7 THE WITNESS: I think the BeadChip was a 8 superior evolution of the technology. The ArrayMatrix 9 was sort of the first generation, and as we developed the 10 BeadChip, there were cost as well as customer advantages 11 and, perhaps most importantly, there was competitive 12 advantages on how quickly we could build new products 13 around the BeadChip. The ArrayMatrix was less flexible 14 in terms of product evolution.</p> <p>15 BY MR. SHULMAN:</p> <p>16 Q. Okay. So after discontinuance of selling the 17 ArrayMatrix product, was the BeadChip the only remaining 18 bead array product that Illumina sells?</p> <p>19 MR. COSTAKOS: Objection. Form.</p> <p>20 THE WITNESS: Yes. BeadChip is a family -- you 21 said "product," and so now I know you're going to cut my 22 answers closely. It's actually a family of products, and</p>	<p>1 April or early May of 1998, did you enter into any 2 written or oral agreements with any third parties 3 relating to what eventually became the business of 4 Illumina?</p> <p>5 MR. COSTAKOS: Objection. Form. By "you" --</p> <p>6 MR. SHULMAN: I mean you personally, yes.</p> <p>7 THE WITNESS: Could you repeat the question?</p> <p>8 MR. SHULMAN: Absolutely.</p> <p>9 BY MR. SHULMAN:</p> <p>10 Q. Before Illumina was actually incorporated, 11 whenever that occurred --</p> <p>12 A. Yes.</p> <p>13 Q. -- did you personally enter into any written or 14 oral agreements with any third parties that related to 15 what eventually became the business of Illumina?</p> <p>16 A. I don't think I personally did.</p> <p>17 Q. Okay. Did Mr. Bock?</p> <p>18 A. I don't think that he did, but...</p> <p>19 Q. I mean to your knowledge.</p> <p>20 A. Not to my knowledge.</p> <p>21 Q. Is it correct that the first time Illumina had 22 any assets or value to the business was when you signed</p>
Page 38	Page 40
<p>1 there's lots of bead chips.</p> <p>2 BY MR. SHULMAN:</p> <p>3 Q. Okay. But the BeadChip format is the only bead 4 array product that Illumina sells after it discontinued 5 selling the ArrayMatrix?</p> <p>6 A. So, again, I'm going to be very concise.</p> <p>7 The BeadChip products are the only bead array 8 products that I know of that incorporate the array 9 technology today that are sold by Illumina.</p> <p>10 Q. Okay. Now, you mentioned earlier that you 11 incorporated Illumina in either April or May of 1998?</p> <p>12 A. Yeah. My recollection is late April, but 13 it's --</p> <p>14 Q. Okay.</p> <p>15 A. -- you know, in that time frame.</p> <p>16 Q. Is it correct that there were no contracts or 17 agreements between Illumina and any other party before 18 the incorporation date?</p> <p>19 MR. COSTAKOS: Objection. Form.</p> <p>20 THE WITNESS: I believe that's correct.</p> <p>21 BY MR. SHULMAN:</p> <p>22 Q. Okay. Before incorporating Illumina in either</p>	<p>1 the license with Tufts in May of '98?</p> <p>2 MR. COSTAKOS: Objection. Form.</p> <p>3 THE WITNESS: I think that's fair. Yeah, sure.</p> <p>4 BY MR. SHULMAN:</p> <p>5 Q. Okay. And after you signed the license with 6 Tufts, you got busy building the company by hiring folks 7 and raising money?</p> <p>8 A. Correct.</p> <p>9 Q. And when did you first contact Steve Auger, 10 A-u-g-e-r, about the possibility of joining Illumina?</p> <p>11 A. I hope I pronounce his name correctly. I 12 pronounce it Steve Auger.</p> <p>13 Q. Auger.</p> <p>14 A. And --</p> <p>15 Q. I stand corrected.</p> <p>16 A. Yes. And the way we became associated -- he 17 eventually joined Illumina -- was that he was working for 18 a scientist named Mark Chee, who I had met through other 19 relationships prior to founding Illumina. And when it 20 looked like we were going to be starting Illumina, 21 meaning we were getting closer to satisfactory terms from 22 Tufts, I met Mark up in the Palo Alto area, and Mark had</p>

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<p style="text-align: center;">Page 41</p> <p>1 started a little -- I'll call it a virtual company. I 2 hope I'm not insulting anybody, but it was just him and 3 Steve Auger that were working in this company called 4 N Genetics.</p> <p>5 When Mark heard about the Walt technology and 6 realized that I was looking for a founding team and he 7 was intrigued and thought there might be a possibility 8 that we could combine forces, he brought up that Steve 9 Auger was an employee of his. And I said, "Great," you 10 know, "let's add Steve to the Illumina team."</p> <p>11 Q. And when was that? In the May time frame?</p> <p>12 A. The discussions probably were -- were probably 13 in the winter of '98. In terms of my discussions with 14 Mark, Steve Auger didn't become an official employee of 15 Illumina until June of '98.</p> <p>16 Q. Okay.</p> <p>17 A. So there was some discussions, and eventually 18 that reached oral commitments, but, actually, employment 19 didn't start until the June time frame.</p> <p>20 Q. And what was Mr. Chee's or Dr. Chee's company's 21 name at the time?</p> <p>22 A. I believe it was called N Genetics.</p>	<p style="text-align: center;">Page 43</p> <p>1 Q. Okay. Did you and Chee and Auger have a 2 face-to-face meeting prior to the time that Auger 3 migrated west?</p> <p>4 A. I had face-to-face meetings with Mark Chee. I 5 can't remember whether Steve was in those meetings or 6 not.</p> <p>7 [REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p>
<p style="text-align: center;">Page 42</p> <p>1 Q. N as in "Nancy"?</p> <p>2 A. N as in "Nancy."</p> <p>3 Q. And it was located out in Palo Alto?</p> <p>4 A. Yes. I think Steve was actually based on the 5 east coast in the Massachusetts area, and so they were 6 bi-coastal, but there was only two of them, so -- hence 7 my description of it being primarily a virtual company.</p> <p>8 Q. Okay. And when did -- so Mr. Auger had to move 9 to the west coast once he decided to join Illumina?</p> <p>10 A. Yes.</p> <p>11 Q. Okay. And when did he actually move out to the 12 west coast?</p> <p>13 A. Sometime -- I don't know when he actually moved 14 out. I know he was here by June of '98. So I don't know 15 whether he moved out the end of May or the beginning of 16 June.</p> <p>17 Q. Okay. And before he moved out or physically 18 relocated to the -- to the west coast, did you ever have 19 any face-to-face meetings with him?</p> <p>20 A. I don't really recall whether I just talked to 21 him on the phone or whether I actually met him in person. 22 I just don't recall.</p>	<p style="text-align: center;">Page 44</p> <p>1 Q. Well, before we go down that road -- I mean, 2 this isn't all that important, but I'm just working from 3 your prior testimony --</p> <p>4 A. Yes.</p> <p>5 Q. -- so let me show it to you. If you'd look at 6 Exhibit 3, please. Exhibit 3.</p> <p>7 A. Oh, okay.</p> <p>8 Q. And turn to the page that has this production 9 number: 3072145.</p> <p>10 A. Two -- what were the last three digits?</p> <p>11 MR. COSTAKOS: 145.</p> <p>12 VIDEOGRAPHER: Mr. Stuelpnagel, can I have you 13 raise your mic up a little bit.</p> <p>14 THE WITNESS: Yes. I'm sorry. Does that help?</p> <p>15 VIDEOGRAPHER: That helps. Thanks.</p> <p>16 THE WITNESS: Okay.</p> <p>17 MR. SHULMAN: 145.</p> <p>18 BY MR. SHULMAN:</p> <p>19 Q. And beginning at line 4 on page 53 of the 20 transcript, let me read the testimony into the record.</p> <p>21 [REDACTED]</p>

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1

[REDACTED]

20

Q. Okay. And I noticed in looking online that
each year a proxy statement was put together for
Illumina, once it became public, listing share ownership

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1

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1 of significant managers within the company. Are you
2 familiar with those documents?

3 A. Yes.

4 Q. Okay. And those documents report on how many
5 shares you owned at any given point in time. Correct?

6 A. I believe that's right.

7 MR. SHULMAN: Let me just mark as Exhibit 4 on
8 of these proxy statements. This one is entitled Notice
9 of Annual Meeting of Stockholders to be held on June 28,
10 2005.

11 There you go.

12 THE WITNESS: Thank you.
13 (Exhibit 4 was marked.)

14 BY MR. SHULMAN:

15 Q. And if you turn, please, to the page numbered
16 18, and do you find there a list of directors and
17 officers as well as recitation of share ownership?

18 A. Yes.

19 Q. And if you could, could you explain to me, next
20 to your name, what the meaning is of the entry under the
21 first column that says "shares issuable pursuant to
22 options exercisable within 60 days of January 31, 2005."

17 Q. Did you give that testimony, sir?

18 A. Yes.

19 MR. COSTAKOS: Objection. Form.

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<p>1 A. You know, that's an accounting term, and I'd 2 rather not define it. I think that you can probably find 3 somebody better than I that could define what that -- 4 that qualification of what that meant.</p> <p>5 Q. Okay. What was your understanding at the time?</p> <p>6 A. It's -- the -- I think this is the number of 7 shares that were -- there's stock options that are 8 granted as incentives to employees.</p> <p>9 Q. Correct.</p> <p>10 A. I received some of those. They vest over time. 11 We use -- typically would have a five-year vest period, 12 and I think what this is probably referring to is the 13 number of shares that I -- of those options that I 14 received that were already vested that I could exercise 15 within that time frame.</p> <p>16 Q. I see.</p> <p>17 A. And, again, I'm not an accountant; so that's 18 my -- my best I can do.</p> <p>19 Q. Okay. And then adjacent to that column, 20 there's a column entitled Beneficial Ownership. Do you 21 see that?</p> <p>22 A. Yes.</p>	<p>1 Q. Roughly.</p> <p>2 A. I'm -- yeah, give me a minute.</p> <p>3 Q. Sure.</p> <p>4 A. I didn't really... 5 I don't know. I should, but I can't -- so in 6 April of 2009, I probably owned somewhere in the range of 7 150-, 200,000 shares.</p> <p>8 Q. So you had sold a significant --</p> <p>9 A. Yes.</p> <p>10 Q. -- amount?</p> <p>11 Okay. And since you left the company, do you 12 still own any shares of Illumina?</p> <p>13 A. Yes. Down to like 50,000 shares.</p> <p>14 Q. Okay. Now, in the spring or early summer of 15 '98, Mr. Walt -- or Dr. Walt also invested money in 16 Illumina. Correct?</p> <p>17 A. Correct.</p> <p>18 Q. And he received stock like you did. Correct?</p> <p>19 A. (Nods head.)</p> <p>20 Q. And did Mr. Chee and Mr. Auger also invest in 21 the company?</p> <p>22 A. Not in the Series A financing.</p>
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<p>1 Q. Okay. And it says for you at that point, you 2 had 704,000 and change shares of which you are the 3 beneficial owner?</p> <p>4 A. Yes.</p> <p>5 Q. Does that -- was it your understanding at the 6 time that that meant that you owned 700,000 shares 7 outright?</p> <p>8 A. I think the "outright" part is where it gets a 9 little fuzzy.</p> <p>10 So this was the number of shares that I owned, 11 but some of those shares were probably still subject to a 12 repurchase right that the company could have should I 13 have left the company --</p> <p>14 Q. Okay.</p> <p>15 A. -- so --</p> <p>16 Q. So there was some --</p> <p>17 A. So taking that -- so "outright" is where I had 18 a little trouble with your question.</p> <p>19 Q. Okay. And when you left the company, 20 approximately how many shares were you the beneficial 21 owner of?</p> <p>22 A. Try to think.</p>	<p>1 Q. Did they receive founder's stock?</p> <p>2 A. Yes. As a condition of their employment. So 3 they purchase -- received -- they pushed at par value of 4 the fair market value their stock -- common stock when 5 they joined the company.</p> <p>6 Q. Now, since 1998, Mr. Walt or Dr. Walt has been 7 the chairman of Illumina's scientific advisory board. 8 Correct?</p> <p>9 A. I think that's correct.</p> <p>10 Q. Okay. And he currently is a member also of the 11 board of directors of Illumina. Right?</p> <p>12 A. (Nods head.)</p> <p>13 Q. For about how long has he been a member of the 14 board of directors?</p> <p>15 A. Well, since we organized the board of 16 directors, so --</p> <p>17 Q. Going on 12 years?</p> <p>18 A. Yes.</p> <p>19 Q. Okay.</p> <p>20 A. He was at the first meeting.</p> <p>21 Q. Now, as of April 1998, there were no employees 22 of Illumina. Correct?</p>

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<p>1 A. Correct.</p> <p>2 Q. Okay. And Illumina hired its first three</p> <p>3 employees in June of '98. Correct?</p> <p>4 A. That's correct.</p> <p>5 Q. And those first three were Dr. Chee -- is it</p> <p>6 Dr. Auger?</p> <p>7 A. It's -- he doesn't have a Ph.D. It's Mister.</p> <p>8 Q. Mr. Auger?</p> <p>9 A. Yes.</p> <p>10 Q. And Dr. Czarnik?</p> <p>11 A. Correct.</p> <p>12 Q. Okay. And when did Illumina hire its next</p> <p>13 employees after this June time frame when the first three</p> <p>14 came on board?</p> <p>15 A. Later that summer. I think it might have been</p> <p>16 August or September including the official hiring of me.</p> <p>17 Q. Using your official hiring as a milestone, was</p> <p>18 anyone else hired by Illumina after these first three</p> <p>19 before you were?</p> <p>20 A. I think so. You know, we're talking about a</p> <p>21 few days, two weeks. I think Steve -- Steven --</p> <p>22 Dr. Steven Barnard was hired before I was officially</p>	<p>1 A. Yes.</p> <p>2 Q. -- did you have any written or oral</p> <p>3 communications with any third parties about the</p> <p>4 possibility of their joining Illumina after it was</p> <p>5 founded?</p> <p>6 A. Yes.</p> <p>7 Q. Okay. With whom?</p> <p>8 A. Dr. Todd Dickinson.</p> <p>9 Q. Anyone else?</p> <p>10 A. The time frame was before the incorporation of</p> <p>11 Illumina.</p> <p>12 I think it was -- we talked to a lot -- not a</p> <p>13 lot -- a number of people about joining the company, but</p> <p>14 of those that eventually joined, the only one that I can</p> <p>15 think of is Todd.</p> <p>16 Q. I didn't limit it to those --</p> <p>17 A. Oh, okay.</p> <p>18 Q. -- who eventually joined.</p> <p>19 A. Sorry. I misinterpreted the question.</p> <p>20 Q. Obviously you spoke to Mr. Chee or Dr. Chee?</p> <p>21 A. Yes.</p> <p>22 Q. And you spoke to Dr. Auger?</p>
<p>1 hired.</p> <p>2 Q. Okay. So as of the time that you were hired --</p> <p>3 effective September 1, was it, of '98?</p> <p>4 A. Yeah, if you say so.</p> <p>5 Q. Okay. But roughly that time frame?</p> <p>6 A. Roughly that time frame.</p> <p>7 Q. Okay. As of September 1 when you were hired,</p> <p>8 of '98, there was Chee, Auger, Czarnik, and Barnard, you</p> <p>9 said?</p> <p>10 A. Uh-huh.</p> <p>11 Q. Were there any other employees?</p> <p>12 A. I don't think so.</p> <p>13 Q. Okay. Now, before incorporating Illumina in</p> <p>14 April of '98, did you have any written or oral</p> <p>15 communications with any third parties about the</p> <p>16 possibilities of their joining Illumina after it was</p> <p>17 founded?</p> <p>18 A. I'm sorry. Could you repeat that question?</p> <p>19 Q. Sure.</p> <p>20 Before you incorporated Illumina --</p> <p>21 A. Yes.</p> <p>22 Q. -- in late April or early May of '98 --</p>	<p>1 A. Yes.</p> <p>2 Q. And you spoke to Dr. Czarnik?</p> <p>3 A. Yes.</p> <p>4 Q. And perhaps Barnard?</p> <p>5 A. Yes.</p> <p>6 Q. And now you've mentioned Dickinson?</p> <p>7 A. Yes.</p> <p>8 Q. And these are all people who eventually did</p> <p>9 join?</p> <p>10 A. Yes.</p> <p>11 Q. Okay. Did you speak to any other people who</p> <p>12 didn't join?</p> <p>13 A. Yes.</p> <p>14 Q. Who were they?</p> <p>15 A. I don't remember a full list, but one that I</p> <p>16 know is Greg Kirk. Dr. Greg Kirk.</p> <p>17 Q. Okay. Anyone else?</p> <p>18 A. I can't remember anybody else.</p> <p>19 Q. Now, is it correct that Illumina's first</p> <p>20 commercial bead array product was sold beginning in 2003?</p> <p>21 A. I believe that's correct. We might have</p> <p>22 offered it for sale in 2002, and we were selling</p>

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<p>1 services, not products, I think in 2002, also.</p> <p>2 Q. Okay. And was the first bead array product the</p> <p>3 BeadChip, the ArrayMatrix, or something else?</p> <p>4 A. It was one -- the first bead array product was</p> <p>5 the ArrayMatrix. There was other products that worked</p> <p>6 with that product that were sold in concert, including an</p> <p>7 instrument, for instance, and reagents.</p> <p>8 Q. Okay. So the ArrayMatrix was first sold in</p> <p>9 2003 in this bead array family. And later on the</p> <p>10 BeadChip was sold?</p> <p>11 A. Yes.</p> <p>12 Q. Okay. And prior to the first sale of the</p> <p>13 ArrayMatrix in 2003, did Illumina commercially use any</p> <p>14 bead array products that included the Walt technology</p> <p>15 even if they didn't sell it?</p> <p>16 A. Yes.</p> <p>17 MR. COSTAKOS: Objection. Form.</p> <p>18 THE WITNESS: Yes. I think you asked</p> <p>19 commercially --</p> <p>20 MR. SHULMAN: Yes.</p> <p>21 THE WITNESS: -- and that would have been the</p> <p>22 commercial services that we offered for sale.</p>	<p>1 make it absolutely flat.</p> <p>2 Q. It was planar before you etched the wells?</p> <p>3 A. I think that's right, yeah, yeah.</p> <p>4 Q. And how many wells, approximately, are etched</p> <p>5 onto the surface of the BeadChip?</p> <p>6 A. Good question.</p> <p>7 Q. Roughly.</p> <p>8 A. In the first commercial iteration or now?</p> <p>9 Q. Well, you can tell me about the evolution if</p> <p>10 you want.</p> <p>11 A. Okay. So -- and I'm going to do this math on</p> <p>12 the fly so it could be really well off.</p> <p>13 Somebody who's got it in front of them could do</p> <p>14 a better job.</p> <p>15 But to the best of my recollection, we had 12</p> <p>16 stripes. Each of those stripes held about 20,000 to</p> <p>17 25,000 to 30,000 -- let's call it 30,000 unique features.</p> <p>18 And we, at the time, represented each unique feature</p> <p>19 about 30-fold. So it would be 30 times 30,000 times 12,</p> <p>20 approximately the number of wells on the first iteration</p> <p>21 of the BeadChip.</p> <p>22 Since then, oh, gosh, it's gone up a lot.</p>
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<p>1 BY MR. SHULMAN:</p> <p>2 Q. Okay. And when did that begin, sir?</p> <p>3 A. My best recollection was either right at -- I'm</p> <p>4 trying to remember if it was 2001 or 2002. It was</p> <p>5 certainly in 2002, and it might have also been in 2001.</p> <p>6 Q. Okay. Now, I want to focus on the BeadChip</p> <p>7 family of products.</p> <p>8 A. Okay.</p> <p>9 Q. Okay?</p> <p>10 Is it correct that the BeadChip family of</p> <p>11 products constitute a flat, planar surface with wells</p> <p>12 etched out on the surface?</p> <p>13 A. Yes. Wells for holding the beads.</p> <p>14 Q. Correct.</p> <p>15 And the flat, planar surface, is it akin to a</p> <p>16 microscope slide, or can you describe it for us?</p> <p>17 A. It's -- it's similar in shape to a microscope</p> <p>18 slide. It's actually made out of silica, so it's not</p> <p>19 just standard glass.</p> <p>20 Q. Glass, right.</p> <p>21 A. And planar is kind of a weird term because it</p> <p>22 did have the wells, and so certainly the wells didn't</p>	<p>1 Q. So the density has risen?</p> <p>2 A. At least by well over 10-fold and maybe --</p> <p>3 maybe closer to 50-fold from there.</p> <p>4 Q. Okay. And what is the approximate dimension of</p> <p>5 the BeadChip substrate itself?</p> <p>6 A. It's a little bit different than a microscope</p> <p>7 slide. It's a little bit longer, but approximately</p> <p>8 1 inch by 3 inches. And then I could be off by a half an</p> <p>9 inch or more in each direction.</p> <p>10 Q. Okay. And so 30 times 30,000 times 12 is</p> <p>11 roughly 10 million?</p> <p>12 A. Okay. That actually sounds right.</p> <p>13 Q. Okay. So at least in the first iteration,</p> <p>14 approximately 10 million wells per BeadChip?</p> <p>15 A. Yes.</p> <p>16 Q. Okay. And beads were intended to be inserted</p> <p>17 into each well. Correct?</p> <p>18 A. Yes.</p> <p>19 Q. Okay.</p> <p>20 A. One bead per well.</p> <p>21 Q. And when you began selling the BeadChip product</p> <p>22 family, were the beads already inserted or attached to</p>

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<p>1 the wells when it goes out to the customer?</p> <p>2 A. Yes.</p> <p>3 Q. Okay. And those beads already had attached to</p> <p>4 them whatever bioactive agents were attached to them.</p> <p>5 Correct?</p> <p>6 A. Yes.</p> <p>7 Q. Okay. Now, with the BeadChip format, the</p> <p>8 planar format with the wells and the beads in them, how</p> <p>9 are the BeadChips containing these beads exposed to the</p> <p>10 target analytes?</p> <p>11 A. Put on -- the last step of the manufacturing is</p> <p>12 essentially a gasketing system, which separated -- I</p> <p>13 mentioned that there were 12 stripes. We could separate</p> <p>14 them in different ways, so that in some cases, the</p> <p>15 gasketing system would separate each stripe individually,</p> <p>16 so there would be 12 isolated stripes from the gasketing</p> <p>17 system.</p> <p>18 Sometimes we would group two or more stripes</p> <p>19 together, in which case there would be six locations for</p> <p>20 samples. There was an access hole and an exit hole in</p> <p>21 which the sample could be put in.</p> <p>22 Q. I heard what you said --</p>	<p>1 Q. How did you place the gasket on top of the chip</p> <p>2 with such precision that you wouldn't knock off the</p> <p>3 beads?</p> <p>4 A. First of all, the -- there was clearance</p> <p>5 between -- so the beads didn't -- the wells and the bead</p> <p>6 weren't covering the entire chip. We actually had</p> <p>7 discrete sections on the chip where the beads were</p> <p>8 located -- the beads and the wells.</p> <p>9 And so the gasket itself was designed to be</p> <p>10 outside of that discrete area that housed the beads.</p> <p>11 Q. So when you mentioned the stripes before,</p> <p>12 that's like lanes of traffic and the beads are in the</p> <p>13 middle of the lanes?</p> <p>14 A. Sure, yes.</p> <p>15 Q. Okay. And then you placed this gasket over it,</p> <p>16 and it forms compartments around either an entire stripe</p> <p>17 or section of --</p> <p>18 A. --</p> <p>19 (Interruption by reporter.)</p> <p>20 BY MR. SHULMAN:</p> <p>21 Q. Either around an entire stripe or multiple</p> <p>22 stripes. Correct?</p>
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<p>1 A. Yeah, I know.</p> <p>2 Q. -- and I appreciate the explanation, but I'm</p> <p>3 having difficulty picturing it.</p> <p>4 So if you have the BeadChip with the wells and</p> <p>5 the beads on it, you mentioned this gasket. Is the</p> <p>6 gasket some sort of physical device that's placed over</p> <p>7 the BeadChip?</p> <p>8 A. Yes. Think of it as a -- how can I describe</p> <p>9 it? -- sticky side that had raised about a couple of</p> <p>10 millimeters of distance with another clear plastic over</p> <p>11 the top of it. And so we would stick the sticky side</p> <p>12 down --</p> <p>13 Q. Uh-huh.</p> <p>14 A. -- and so in that process we would create</p> <p>15 compartments in which one could contain liquid.</p> <p>16 Q. Okay.</p> <p>17 A. And so the liquid would be the things that</p> <p>18 contained the target analyte, and we would introduce the</p> <p>19 liquid through that plastic sheath over the top filling,</p> <p>20 essentially, that vessel that we've created by the bottom</p> <p>21 being the BeadChip and the top being this clear plastic</p> <p>22 and the sides being kind of a spongy, foamy material.</p>	<p>1 A. Yes.</p> <p>2 Q. Okay. And then, not to be too colloquial, but</p> <p>3 you squirt the target analyte into these compartments?</p> <p>4 A. Yes.</p> <p>5 Q. Okay. And then you allow a reaction time, and</p> <p>6 hopefully some binding goes on?</p> <p>7 A. That's right.</p> <p>8 Q. Okay. And how do you read or decode the</p> <p>9 BeadChips?</p> <p>10 MR. COSTAKOS: Objection. Form.</p> <p>11 THE WITNESS: We do that at time of</p> <p>12 manufacturing. Reading is different than decoding, so</p> <p>13 I'm going to just focus on decoding.</p> <p>14 BY MR. SHULMAN:</p> <p>15 Q. Forget about the decoding.</p> <p>16 A. Oh.</p> <p>17 Q. I'm not interested.</p> <p>18 How do you read the results?</p> <p>19 A. Oh, okay.</p> <p>20 So we had a proprietary instrument in which you</p> <p>21 placed the BeadChip after you stripped the gasket back</p> <p>22 off and you rinse it a lot of times, et cetera. And then</p>

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<p>1 you put it into the instrument, and the instrument would 2 scan this with a confocal laser and essentially detect 3 the fluorescence from that.</p> <p>4 Q. Approximately how long after the Sentrix 5 ArrayMatrix product was introduced did you introduce the 6 BeadChip format, roughly?</p> <p>7 A. Yeah, and I could be wrong on my dates, but I'm 8 pretty sure it was 2004.</p> <p>9 Q. So about a year later?</p> <p>10 A. Yes.</p> <p>11 Q. Okay. So they've both been on the market, at 12 the same time at least, since 2004?</p> <p>13 A. Yes.</p> <p>14 Q. And which of the two formats, the ArrayMatrix 15 or the BeadChip format, has been the more successful?</p> <p>16 MR. COSTAKOS: Objection. Form.</p> <p>17 THE WITNESS: Depends on time. So initially 18 the bead -- the ArrayMatrix was much more successful. 19 That was the bulk of our sales in 2003, obviously, 2004, 20 and into the first half of 2005. It was in the 2000- -- 21 middle of 2005 when we launched our first Infinium 22 products. Those are the whole-genome genotyping family</p>	<p>1 there was much more sales from a revenue standpoint from 2 BeadChips than there were from the ArrayMatrix. 3 Q. And that continued through the time when 4 Illumina announced in late 2009 that the ArrayMatrix is 5 no longer going to be offered?</p> <p>6 A. Yes.</p> <p>7 Q. Okay. Let me just ask you some questions about 8 the ArrayMatrix, and then we'll take a short break. 9 The ArrayMatrix product was a bundle or had 10 several bundles of fiberoptic strands bundled together. 11 Correct?</p> <p>12 A. Yes.</p> <p>13 Q. And in the configuration as sold, were the 14 number of bundles 96 in number, 384 in number, 1536 in 15 number, or some other number?</p> <p>16 A. 96.</p> <p>17 Q. Okay. And approximately how many fiberoptic 18 strands per bundle were included in the ArrayMatrix 19 product?</p> <p>20 A. To the best of my recollection, it was like 21 50,000 in each of the bundles.</p> <p>22 Q. Okay. And did that number grow over time, or</p>
<p style="text-align: center;">Page 66</p> <p>1 of products where there was a pretty large shift in our 2 customer base from using the ArrayMatrix to using the 3 BeadChip.</p> <p>4 BY MR. SHULMAN:</p> <p>5 Q. Okay. So the first year or so that they were 6 both on the market, the ArrayMatrix was selling much 7 better than the BeadChip?</p> <p>8 A. Yes. And that was because they addressed -- 9 they were different products. The -- the BeadChip, as it 10 was first introduced, was for whole-genome expression --</p> <p>11 Q. Right.</p> <p>12 A. -- whereas the ArrayMatrix was primarily for 13 genotyping, and genotyping was a bigger part of our 14 business than expression.</p> <p>15 Q. Okay. And beginning in mid-2005, sales of the 16 BeadChip eclipsed the sales of the ArrayMatrix product?</p> <p>17 A. Sometime -- not in the beginning of 2005 18 because --</p> <p>19 Q. I think I said mid-2005.</p> <p>20 A. Yeah, okay. I'm sorry. I'm trying to listen 21 too carefully.</p> <p>22 The -- yes, sometime in the later part of 2005,</p>	<p style="text-align: center;">Page 68</p> <p>1 was that the number from the beginning?</p> <p>2 A. No. That was the number from the beginning. 3 It points to the inflexibility of that format.</p> <p>4 Q. Okay. And so each bundle in the ArrayMatrix 5 bundle of bundles contains an array of strands. Correct?</p> <p>6 A. Each contains an array of strands, yes. Well, 7 no. Or -- I'm just -- I'm stumbling over the word 8 "array" because I use "array" for the bundle. I guess 9 you could say a collection of strands would make me feel 10 more comfortable.</p> <p>11 Q. Well, if you just look at the bundle itself --</p> <p>12 A. Yes.</p> <p>13 Q. -- and forget about all the other bundles in 14 the product --</p> <p>15 A. Yeah, yeah.</p> <p>16 Q. -- within a single bundle, there's an array of 17 strands. Correct?</p> <p>18 A. Yeah. I'm just, again, stumbling over what 19 you -- what I would call an array.</p> <p>20 I would call an array, maybe too narrowly, but, 21 in the context of Illumina, something that has 22 bioactive -- multi-bioactive agents on it. And I realize</p>

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1 "array" could have a more colloquial meaning to mean a 2 collection of strands. And so if you mean by "array" a 3 collection of stands, then I'm comfortable with what 4 you're -- 5 Q. That's exactly what I meant. 6 A. Yeah. 7 Q. Okay. So each bundle contains an array of 8 strands in the sense of being a collection of strands. 9 Correct? 10 A. Yes. 11 Q. All right. And the combined bundles, the 96 in 12 the product, contain an array of arrays. Correct? 13 A. Yes. The -- the whole ArrayMatrix, we would 14 call an array of arrays. 15 Q. Okay. And a well is etched into the distal end 16 of each strand in each of the bundles? 17 A. Yes. 18 Q. Okay. And one well per strand. Correct? 19 A. Yes. 20 Q. And a bead in each well. Correct? 21 A. Ideally. 22 Q. Ideally.	1 You had a -- a 90- -- 96 bundles in your 2 Sentrix ArrayMatrix. 3 A. Yes. 4 Q. -- product. Right? 5 A. Yes. 6 Q. And the bundles were arranged in a spacing and 7 a configuration so they would fit into individual wells 8 of a 96-well -- 9 A. Yes. 10 Q. -- microtiter plate. Correct? 11 A. Yes. 12 Q. Okay. That was what I was trying to ask 13 inadvertently before. 14 A. Sorry. 15 Q. And in this ArrayMatrix system, each of the 16 fiberoptic bundles in this collection of 96 is inserted 17 simultaneously into its own sample well in the well 18 plate. Right? 19 A. Yes. 20 Q. Okay. And royalties are paid to Tufts on the 21 ArrayMatrix product when you were selling it. Correct? 22 A. Yes.
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1 A. But we didn't -- we never got 100 percent fill. 2 Q. But that's the goal? 3 A. That's the goal. 4 Q. Okay. And as sold by Illumina, the beads were 5 already attached to the fiberoptic strands. Correct? 6 A. Yes. 7 Q. And the beads already had attached to them 8 whatever bioactive agent you chose to attach. Correct? 9 A. Correct. I'm sorry. 10 Q. And the ArrayMatrix system at Illumina also 11 used a microtiter plate containing -- containing sample 12 solution wells or assay wells. Correct? 13 A. Whoever did the experiment would format it in a 14 microtiter plate. The ArrayMatrix was designed to mate 15 to that microtiter plate. 16 Q. Okay. And in the Sentrix or the ArrayMatrix 17 system, the number of wells in the microtiter plate, as 18 well as their spacing and configuration, matches the 19 number, spacing, and configuration of the fiberoptic 20 bundles containing the beads. Correct? 21 A. Could you repeat that, please. 22 Q. Yeah.	1 [REDACTED] 10 BY MR. SHULMAN: 11 Q. Okay. Are there any products sold by Illumina 12 that use beads other than the BeadChip family and the 13 ArrayMatrix family? 14 A. Yes. 15 Q. And what are they? 16 A. We acquired a company called CyVera. Gosh, the 17 dates are escaping me. I think it was 2006. And CyVera 18 had a different bead system. Doesn't use the Walt 19 technology. And so -- we still sell it. It's called 20 BeadXpress technology. 21 MR. SHULMAN: Okay. Why don't we take a 22 10-minute break. We'll try and keep it short since we

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1 got started late. 2 THE WITNESS: Okay. 3 VIDEOGRAPHER: Off the record at 11:15. 4 (Recess.) 5 VIDEOGRAPHER: We're on the record at 6 11:24 a.m. 7 BY MR. SHULMAN: 8 Q. Dr. Stuelpnagel, in -- back in 1998, did 9 Illumina ever have or use office space in Cardiff, 10 California? 11 A. Yes. 12 Q. And during what period of time? 13 A. From approximately time of incorporation 14 through the fall -- I'm guessing October or maybe 15 November of '98 -- we were housed in Cardiff -- 16 Q. Okay. 17 A. -- in the CW offices. 18 Q. Okay. 19 A. It was rent-free. CW provided those offices to 20 us. 21 Q. And do you remember the address? 22 A. No. I should. No, I don't. Sorry.	1 of 1998. Is that -- 2 A. November is my recollection. 3 Q. So the Cardiff space was occupied until roughly 4 October sometime? 5 A. October. Could have been late September. In 6 that area. 7 Q. Now, before this lawsuit was filed by Illumina 8 in 2009, the one that brings us together today, there was 9 an earlier lawsuit between Affymetrix and Illumina. 10 Correct? 11 A. Correct. 12 Q. And that earlier lawsuit was filed by 13 Affymetrix against Illumina back in Delaware. Correct? 14 A. Yes, I believe that's right. 15 Q. Okay. And you testified as a witness for 16 Illumina in the trial of that Delaware case. Right? 17 A. Correct. 18 Q. And before testifying in court in Delaware, you 19 took an oath to tell the truth. Correct? 20 A. Yes. 21 Q. And I assume you complied with the oath when 22 you were testifying?
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1 Q. Okay. And Cardiff is somewhere in the 2 San Diego area? 3 A. Yeah. It's a little beach community about 4 10 miles north of here. 5 Q. Okay. And what was the next office space after 6 using the Cardiff space of CW? 7 A. We moved down here to the UTC area in San Diego 8 on -- 9 Q. I'm sorry? 10 A. University Town Center. It's abbreviated UTC. 11 And that -- I believe the address was -- I 12 don't know what the address was. It was just down the 13 street from where -- where Illumina -- 9885, I think, 14 Towne Centre Drive. I could be wrong, but that's my best 15 recollection. 16 Q. And did you begin occupying that space after 17 you closed the Series B financing? 18 A. We actually began occupying it slightly before 19 we closed the Series B financing, to the best of my 20 recollection. 21 Q. Okay. And I saw in the Illumina Web site that 22 the Series B financing was closed on or about November 1	1 A. To the best of my ability. 2 Q. Okay. And if you'd look again at Exhibit 2, 3 which is a copy of your trial testimony from the Delaware 4 case -- and please turn to page 1012 of the transcript. 5 It's the third page in. 6 And do you see there that at about line 10 or 7 11, Mr. Pals called you as Illumina's first witness? 8 A. Yes. That's what it says here. 9 Q. Okay. And Mr. Pals was Illumina's lawyer or 10 one of them. Correct? 11 A. Yes. 12 Q. And at the time you gave this testimony, you 13 were the chief operating officer and senior vice 14 president of the array business for Illumina? 15 A. Correct. 16 Q. And Mr. Pals was -- strike that. 17 Let's go to page 1035 of the transcript. And 18 beginning at line 9, do you see that Mr. Pals asked you 19 to explain what Exhibit 2054 is? 20 A. Yes. 21 Q. Okay. And in response to that question, you 22 stated that Exhibit 2054 is Illumina's Sentrix

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1 ArrayMatrix. Do you see that?	1 brainstorming session, we realized that what we could do
2 A. I see that.	2 is use this array and insert it into a microtiter plate.
3 Q. Okay. And the next question that Mr. Pals	3 "I believe you saw one of those. It's a common
4 asked you is on lines 15 to 16 where he said, quote, "And	4 format where wells are in a 96 arrangement. And people
5 can you describe how the ArrayMatrix format was arrived	5 commonly use those for experimentation in the lab.
6 at?" Do you see that?	6 "What we could do with this ArrayMatrix is
7 A. Yes.	7 literally just insert it right into the microtiter plate,
8 Q. And your answer to that question begins at	8 and you could do experiments on a sample basis at higher
9 page 1035, line 17, and continues through line 1 of	9 inputs than anybody considered at the time."
10 page 1037. Is that correct?	10 Did I read that correctly, sir?
11 A. 1037...	11 A. Yes.
12 Q. It ends on line 1 of page 1037. Correct?	12 Q. And were you asked those questions, and did you
13 A. Yeah. I'm -- we're trying to read to make sure	13 provide those answers that I just read into the record?
14 that I understand what -- yes. That seems like the	14 A. To the best of my recollection.
15 extent of the description.	15 Q. Now, in the testimony that we just read from
16 Q. Okay. So let me read into the record Mr. Pals'	16 the Delaware case, you referred to a run that you took in
17 questions and your answers beginning at 1035, line 10,	17 the summer of '98 that was followed by a brainstorming
18 and ending at 1037, line 1.	18 session.
19 "Question: Okay. Dr. Stuelpnagel, the exhibit	19 When in the summer of '98 did you take this run
20 you're holding is Exhibit 2054. Can you explain what	20 that led to the brainstorming session?
21 Exhibit 2054 is?	21 A. To the best of my recollection, it would have
22 "Answer: Yes. This is our Sentrix	22 probably been on the weekend. And I lived in Cardiff
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1 ArrayMatrix.	1 the time, and there was a nice 6- or 8-mile loop that I
2 "Question: Can you describe how the	2 used to do. And so that's why I think it was on the
3 ArrayMatrix format was arrived at?	3 weekend because I would only run that distance on the
4 "Answer: Yes. In the summer of 1998, I	4 weekend. And I remember coming back and just thinking
5 mentioned that we were trying to think about ways in	5 about how these arrays could be used differently.
6 which we could format these bead arrays into products	6 And so early summer of 1998, June -- late June,
7 that would be useful to customers.	7 early July time frame.
8 "And I was actually out for a run thinking and	8 Q. Okay. Is there any document we can point to or
9 maybe obsessing a little bit about the Illumina	9 that I could show you to refresh your recollection as to
10 technology and started to realize that this array was	10 what the date was of this run?
11 fundamentally different in its physical form from	11 A. The only document that I know that would lock
12 everybody else's arrays, too.	12 it into a narrower time frame would be an invention
13 "So in addition to being different in how we	13 disclosure that we wrote after the brainstorming session.
14 manufactured it, they were different in form. And what	14 Q. And what time of day did you take this run?
15 was unique about these arrays is that you could take this	15 A. It would have likely been morning because I
16 fiber bundle and put it into a sample.	16 took all my long runs in the morning.
17 "Everybody else took a sample and poured it	17 Q. When it was cool?
18 onto the array. So I started thinking about that and	18 A. Yeah.
19 what you could do that would be different from what	19 Q. And where did you take this run?
20 everybody else was doing.	20 A. In Cardiff. A little lap that actually went
21 "I came back and started talking. My	21 into Del Mar -- went into Solana Beach and then came back
22 colleagues -- we were brainstorming. And after that	22 into Cardiff.

20 (Pages 77 to 80)

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<p>1 Q. Okay. Not to embarrass you, but how long did 2 this run last?</p> <p>3 A. A lot shorter than it would last today. You 4 know, I was probably running seven-, 5 seven-and-a-half-minute miles. So I think it was about a 6 6-mile run. So it was close to, you know, a little less 7 than an hour or something like that.</p> <p>8 Q. Okay. And who were the colleagues that 9 participated in this brainstorming session after your run 10 in the summer of '98?</p> <p>11 A. So it would have been a day or two later when 12 we all assembled back at work. So that would have been a 13 normal workday, a Monday through Friday. And it was Mark 14 Chee and Steve Auger.</p> <p>15 Q. Was Dr. Czarnik there?</p> <p>16 A. No.</p> <p>17 Q. How long did this brainstorming session last?</p> <p>18 A. Probably a couple of hours. Again, I don't 19 have perfect recollection of all of that.</p> <p>20 Q. And was it during the brainstorming session 21 that you and your colleagues arrived at the idea of 22 formulating an array of fiberoptic bundles and inserting</p>	<p>1 THE WITNESS: I think I --</p> <p>2 MR. COSTAKOS: Asked and answered.</p> <p>3 THE WITNESS: -- answered that on -- referring 4 you back to line 13 of page 1035. I said yes, this is 5 our Sentrix ArrayMatrix, which is the 96 bundles and the 6 plate that holds those bundles together.</p> <p>7 BY MR. SHULMAN:</p> <p>8 Q. Sorry. I didn't ask you about line 13.</p> <p>9 A. I'm sorry.</p> <p>10 Q. I asked about your testimony beginning at 11 line 15 going through line 1 of 1037, in that section.</p> <p>12 A. Yes.</p> <p>13 Q. Can you point out to me where you referred to a 14 plate?</p> <p>15 MR. COSTAKOS: Objection. Form, argumentative.</p> <p>16 THE WITNESS: I was responding to Dr. -- or 17 Mr. Pals' question about the ArrayMatrix format, which is 18 this plate, which is Exhibit 2054.</p> <p>19 So all of that, which then is derived from his 20 question on line 15, was referring exactly to this plate, 21 this ArrayMatrix format thing that we're talking about 22 right now.</p>
<p style="text-align: center;">Page 82</p> <p>1 each bundle simultaneously into a separate well in the 2 microtiter well plate?</p> <p>3 A. Yeah, there was a lot more to it than what you 4 said. I think a real key component was how to format 5 that and put that into a block structure with a plate and 6 how that would interface and the customer would use that. 7 But all of that is what we considered to be part of the 8 ArrayMatrix products that we eventually developed.</p> <p>9 Q. Okay. But in terms of the idea that you 10 described in your testimony at pages 1035 through 1037, 11 that idea was developed during this brainstorming 12 session?</p> <p>13 A. Yeah, that plate that held the 96 fiber 14 bundles.</p> <p>15 Q. Okay. Can you show me where in your testimony 16 there's reference to a plate?</p> <p>17 A. The Sentrix ArrayMatrix was a plate. It was a 18 plate that held the 96 fiber bundles. It was a device.</p> <p>19 Q. In your testimony beginning at line 15 of 20 page 1035 and ending at line 1 of 1037, can you point to 21 me where you mentioned a plate?</p> <p>22 MR. COSTAKOS: Objection. Form.</p>	<p style="text-align: center;">Page 84</p> <p>1 BY MR. SHULMAN:</p> <p>2 Q. Can you point to me, please, any passage, 3 beginning at line 15 of page 1035 and ending at line 1 of 4 1037, where you mentioned a plate?</p> <p>5 A. I --</p> <p>6 MR. COSTAKOS: Objection. Form. I think that 7 that question is inappropriate.</p> <p>8 You can answer the question in context. I 9 don't think you need to limit yourself the way he said.</p> <p>10 THE WITNESS: So looking at line 21 through 22, 11 the ArrayMatrix is a plate. So if we're stumbling over 12 the term "plate," fine. We can call it an ArrayMatrix.</p> <p>13 BY MR. SHULMAN:</p> <p>14 Q. Okay. Did you mention the word "plate" 15 beginning at line 15 of page 1035 through line 1 of 16 page 1037 when referring to the ArrayMatrix?</p> <p>17 MR. COSTAKOS: Objection. Form, argumentative. 18 incomplete.</p> <p>19 THE WITNESS: So I think I -- I've answered it 20 as best I can. I don't see --</p> <p>21 BY MR. SHULMAN:</p> <p>22 Q. The answer is either yes or no or you don't see</p>

21 (Pages 81 to 84)

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<p>1 it.</p> <p>2 MR. COSTAKOS: I think he can answer it --</p> <p>3 THE WITNESS: I appreciate your help.</p> <p>4 MR. COSTAKOS: -- however he wants to answer</p> <p>5 it.</p> <p>6 THE WITNESS: I appreciate your help in the</p> <p>7 des- -- my testimony, but, as I mentioned, lines -- the</p> <p>8 lines that you're talking about is around the ArrayMatrix</p> <p>9 format.</p> <p>10 If you're asking me did I call the ArrayMatrix</p> <p>11 format the plate in this testimony, the answer is no.</p> <p>12 BY MR. SHULMAN:</p> <p>13 Q. Okay. Now, the idea that you described</p> <p>14 beginning at line 15 of page 1035 and ending at line 1 of</p> <p>15 page 1037 was one that came up during this brainstorming</p> <p>16 session. Correct?</p> <p>17 A. Yes.</p> <p>18 Q. Okay. And is it correct that the brainstorming</p> <p>19 session with Chee and Auger took place at a boardroom?</p> <p>20 A. We called it a boardroom. It was our</p> <p>21 conference room at CW Group's offices.</p> <p>22 Q. In Cardiff?</p>	<p>1 Q. Okay. And at the time that you came up with</p> <p>2 this brainstorm in the summer of 1998, did you regard</p> <p>3 that brainstorm as an invention?</p> <p>4 A. Yes.</p> <p>5 Q. Okay. And, in fact, you regarded this</p> <p>6 brainstorm as a fundamental invention. Correct?</p> <p>7 A. I don't know what you mean by "fundamental." I</p> <p>8 think it was an important innovation in the company. And</p> <p>9 I don't want to trip over the word "invention" because</p> <p>10 ultimately that's a legal term that the patent office</p> <p>11 decides. But I thought it was an important invention. I</p> <p>12 thought it was -- was really important for the company.</p> <p>13 Q. Fundamental?</p> <p>14 A. Whether you want to call it important, the same</p> <p>15 thing as fundamental, and whether I did on a previous</p> <p>16 date, that's fine.</p> <p>17 Q. Well, I'm asking you for your testimony today,</p> <p>18 if you regard -- did you regard it at the time as a</p> <p>19 fundamental invention for Illumina?</p> <p>20 A. Sure. I don't have a problem with that.</p> <p>21 Q. Okay. With respect to this brainstorm that you</p> <p>22 regarded as a fundamental invention, did you or Dr. Chee</p>
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<p>1 A. In Cardiff.</p> <p>2 Q. Okay. Was the brainstorming session in the</p> <p>3 morning or in the afternoon?</p> <p>4 A. I don't have -- I don't remember.</p> <p>5 Q. And you regarded the brainstorming session as a</p> <p>6 significant meeting. Correct?</p> <p>7 A. I do, yes.</p> <p>8 Q. Now, did you regard the brainstorm that came</p> <p>9 out of the brainstorming session as described at</p> <p>10 page 1035 through 1037 of your testimony as an important</p> <p>11 idea at the time that you came up with it in the summer</p> <p>12 of '98?</p> <p>13 A. When you say "you," meaning the collection of</p> <p>14 the three of us, yes, I did.</p> <p>15 Q. Okay.</p> <p>16 A. Because ultimately that became the first</p> <p>17 product that Illumina offered for sale in the BeadArray</p> <p>18 family.</p> <p>19 Q. So you personally regarded it as an important</p> <p>20 idea at the time, and you say that your fellow inventors</p> <p>21 did as well?</p> <p>22 A. I don't want to speak for them, but I do, yes.</p>	<p>1 or Mr. Auger reduce it to writing at or about the time</p> <p>2 that you say you came up with it in the summer of '98?</p> <p>3 A. Yes.</p> <p>4 Q. And who wrote down this idea?</p> <p>5 MR. COSTAKOS: Objection. Form.</p> <p>6 THE WITNESS: I think I was probably the</p> <p>7 primary author of the invention disclosure --</p> <p>8 MR. SHULMAN: Uh-huh.</p> <p>9 THE WITNESS: -- although there were</p> <p>10 contributions from the other inventors, too.</p> <p>11 BY MR. SHULMAN:</p> <p>12 Q. Okay. And when, relative to the brainstorming</p> <p>13 session, did you prepare this -- I assume it's a</p> <p>14 document?</p> <p>15 A. I don't have perfect recollection of when.</p> <p>16 Q. Right.</p> <p>17 A. It would have been in my habit to have done it</p> <p>18 within a small number of days post-session because I was</p> <p>19 trying to be very diligent about writing and documenting</p> <p>20 these things up.</p> <p>21 Q. And where was this document filed after you</p> <p>22 prepared it?</p>

22 (Pages 85 to 88)

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1 A. It was filed with Illumina.	1 Q. And in -- did you provide her with the original
2 Q. In whose files was this documents kept?	2 or just a copy of the form?
3 A. Originally it was in mine, and I transferred it	3 A. My guess is I probably provided her with a copy
4 to our IP attorney who was outside counsel, Ms. Robin	4 so that we would keep the originals at Illumina, but eve
5 Silva.	5 that I don't know for sure.
6 Q. I'm sorry?	6 Q. And were the originals of invention disclosure
7 A. Ms. Robin Silva.	7 forms, such as the one you prepared in the summer of '98,
8 Q. S-i-l-v-a?	8 maintained at Illumina as part of their business record?
9 A. S-i-l-v-a.	9 A. I believe they are.
10 Q. And where was she at the time?	10 Q. And they're still there today?
11 A. She's changed firms a couple of times. I think	11 A. I believe so.
12 she was with Townsend & Townsend at the time.	12 Q. And who is the custodian of the invention
13 Q. Okay.	13 disclosure forms at Illumina?
14 A. That's my best recollection.	14 A. Well, it's the legal department under Chris
15 Q. And when -- when did you provide --	15 Cabou. I don't know who in his organization is actually
16 A. Oh, no, it wasn't Townsend & Townsend. It was	16 responsible for keeping those things under.
17 in San Francisco, and she -- oh, gosh. The firm no	17 Q. And who is Chris Cabou?
18 longer exists. It was merged. I'm not going to come up	18 A. Chris Cabou is the general counsel at Illumina.
19 with the name, but it was not Townsend & Townsend.	19 Q. How do you spell his last name.
20 Q. Limboc Limboc & Sutton?	20 A. C-a-b-o-u.
21 A. No.	21 Q. Like "caribou"?
22 Q. Was it an IP firm?	22 A. Like "caribou."
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1 A. It was an IP firm. Small IP firm in	1 Q. Okay. Now, let's go back to the Walt
2 San Francisco city. Nice view of the Golden Gate Bridge,	2 technology that Dr. Walt developed and which you licensed
3 if that helps, and the Embarcadero Center.	3 from Tufts.
4 Q. Where is Ms. Silva today, if you know?	4 In the Walt technology, Dr. Walt had inserted a
5 A. Again, she's changed firms or the firms have	5 single bundle of fiberoptic fibers containing beads into
6 merged. That's probably more of an accurate description.	6 a sample solution. Correct?
7 The firms have merged a couple of times, and so I don't	7 A. Correct.
8 quite -- I don't know the firm -- I can't think of the	8 Q. And he did so in some form of a small test tube
9 firm right now that she's in.	9 or an Eppendorf tube?
10 Q. Okay. Can you recall any other firm that she	10 A. That sounds right. I don't want to limit what
11 was associated with beyond the original firm whose name	11 he's done with it, but I do -- at some point he was
12 you can't recall?	12 inserting them into Eppendorf tubes.
13 A. I'm not doing well with law firms.	13 Q. Okay. But as far as you and Dr. Chee and
14 Gosh. Is there a law firm called Deschert,	14 Mr. Auger knew in the summer of '98, Dr. Walt had not
15 D-e-s-c-h-e-r-t? That's --	15 inserted his single bundle into a microtiter well plate.
16 Q. Dechert, D-e-c-h-e-r-t, yes.	16 Correct?
17 A. You know what, I better not be taking guesses.	17 A. You know, he'd be the right one to ask, not me.
18 Q. That's fine.	18 I didn't -- I don't -- I did not see him do that.
19 When did you provide Ms. Silva with a copy of	19 Q. Okay. So as far as you knew, he had --
20 this invention disclosure form?	20 A. Sure.
21 A. I don't remember whether it was days or weeks,	21 (Interruption by reporter.)
22 but it was probably in that relationship.	22 BY MR. SHULMAN:

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<p>1 Q. As far as you knew, he had not done that --</p> <p>2 A. And I said sure.</p> <p>3 Q. -- before?</p> <p>4 A. Sorry.</p> <p>5 Q. Did you get the question?</p> <p>6 I'll repeat it.</p> <p>7 As far as you knew in the summer of 1998,</p> <p>8 Dr. Walt had not inserted his bead-containing fiberoptic</p> <p>9 bundle into a microtiter well plate. Correct?</p> <p>10 A. Correct.</p> <p>11 Q. And, in your mind, in the summer of '98,</p> <p>12 concerning the bead-containing fiberoptic bundle into a</p> <p>13 microtiter well plate was something new and different</p> <p>14 from what Dr. Walt had done.</p> <p>15 MR. COSTAKOS: Objection. Form.</p> <p>16 BY MR. SHULMAN:</p> <p>17 Q. Correct?</p> <p>18 A. No. Well, I think what you're saying is that</p> <p>19 the invention -- and I don't actually think that was the</p> <p>20 invention -- that was the thought that got us thinking</p> <p>21 about how to format 96 arrays together into an</p> <p>22 ArrayMatrix.</p>	<p>1 MR. COSTAKOS: Objection. Form, foundation.</p> <p>2 THE WITNESS: I think that's correct.</p> <p>3 BY MR. SHULMAN:</p> <p>4 Q. And in your mind in the summer of '98,</p> <p>5 inserting the multiple bundles of fiberoptic strands,</p> <p>6 this array of arrays, simultaneously into separate wells</p> <p>7 of the well plate was an idea that originated with you,</p> <p>8 Chee, and Auger during this brainstorming session.</p> <p>9 Correct?</p> <p>10 A. That was my assumption at the time.</p> <p>11 Q. Okay. Now, the microtiter well plate that you,</p> <p>12 Chee, and Auger contemplated using in the summer of '98</p> <p>13 that plate is typically made out of some substrate like</p> <p>14 plastic or metal. Is that correct?</p> <p>15 A. Plastic typically.</p> <p>16 Q. And the microtiter well plate that you</p> <p>17 contemplated using in the summer of '98 can have 96 or</p> <p>18 384 or as many as 1536 wells in it. Correct?</p> <p>19 A. Correct.</p> <p>20 Q. And each of the wells is designed to contain a</p> <p>21 sample solution having a different target analyte.</p> <p>22 Correct?</p>
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<p>1 BY MR. SHULMAN:</p> <p>2 Q. Okay.</p> <p>3 A. So --</p> <p>4 Q. But is it correct that as far as you knew,</p> <p>5 inserting a fiberoptic bundle into a microtiter well</p> <p>6 plate was something different than what you understood</p> <p>7 Dr. Walt to have done?</p> <p>8 A. I didn't have any understanding whether he had</p> <p>9 or had not. It stimulated me to think about how we might</p> <p>10 want to build a product.</p> <p>11 Q. Okay. Now, in the Walt technology that</p> <p>12 Dr. Walt had developed and which you licensed, Dr. Walt</p> <p>13 had a single fiberoptic bundle consisting of several</p> <p>14 fiberoptic strands. Correct?</p> <p>15 MR. COSTAKOS: Objection. Form.</p> <p>16 THE WITNESS: Correct.</p> <p>17 BY MR. SHULMAN:</p> <p>18 Q. And when you came up with the idea of bundling</p> <p>19 together several bundles of fiberoptic strands in this</p> <p>20 array of arrays format in the summer of '98, I take it</p> <p>21 that as far as you and Chee and Auger knew, Dr. Walt had</p> <p>22 not previously come up with this array of arrays format?</p>	<p>1 A. Correct.</p> <p>2 Q. Now, let's return to the bead in well</p> <p>3 fiberoptic bundle that Walt developed and which you</p> <p>4 licensed. And I'm just going to refer to that as the</p> <p>5 Walt bundle.</p> <p>6 A. Okay.</p> <p>7 Q. Okay. And in the Walt bundle, each bead was</p> <p>8 designed to have some bioactive agent attached to it.</p> <p>9 Correct?</p> <p>10 A. Yes.</p> <p>11 Q. Okay. And in the Walt technology, the Walt</p> <p>12 bundle containing the beads with these bioactive agent</p> <p>13 was inserted into some test tube or Eppendorf tube</p> <p>14 containing a sample solution of the target analyte.</p> <p>15 Correct?</p> <p>16 A. Yes.</p> <p>17 Q. Okay. And according to the Walt technology,</p> <p>18 the presence or absence of the target analytes on the</p> <p>19 beads was thereafter detected in some manner that you</p> <p>20 described earlier?</p> <p>21 A. Yes.</p> <p>22 Q. Now, in a prior lawsuit between Illumina and</p>

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1 Dr. Czarnik -- am pronouncing his name correctly?	1 business plan?
2 A. Czarnik, yes.	2 A. Two-fold. One is to really organize our
3 Q. Czarnik, okay.	3 thoughts on how we wanted to propose commercialization
4 You testified that in the summer of '98, you	4 resource utilization, things like that for the company.
5 and Dr. Chee were the primary authors of a business plan	5 So, really, what were we going to try to do?
6 for Illumina. Do you recall that?	6 Q. Uh-huh.
7 A. Primary authors, correct.	7 A. And the other is as a supplement to financing
8 Q. Right. He -- Dr. Czarnik contributed some, but	8 due diligence by private investors, venture capitalists.
9 not very much?	9 Q. So you're -- you're writing the document to,
10 A. And Steve Auger contributed some, too.	10 for lack of a better term, gel your own thinking about
11 MR. SHULMAN: Okay. Let me -- let me ask the	11 what the future business was going to be of Illumina?
12 reporter to mark as exhibit next in order, whatever it	12 A. Yes.
13 is, Exhibit 5, a document bearing production Nos. ILL	13 Q. That was one purpose.
14 3032700 through 2750.	14 A. Yes.
15 (Exhibit 5 was marked.)	15 Q. Correct?
16 BY MR. SHULMAN:	16 And the second purpose was to have a document
17 Q. I'm not going to condemn you to read this whole	17 that you could give to your potential investors in
18 thing because I don't have that many questions about it,	18 connection with the Series B financing?
19 but could you glance through it and tell me if this is a	19 A. Yes.
20 draft of the Illumina business plan that you prepared in	20 Q. Okay. And was the business plan finalized at
21 the summer of '98. And I can help you date this by	21 some point?
22 things that I know where they appear in here if you want	22 A. Was the business plan financed? I don't know
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1 that information.	1 if any business plan is ever finalized because you're
2 A. It appears to be a draft of the Illumina	2 always constantly adjusting your plans, your strategy
3 business plan, and I -- the summer and fall sounds like a	3 from the company's perspective, but it -- it reached a
4 consistent time. Whether it was September or another	4 point where we finished the Series B financing. And,
5 date, that's probably pretty close.	5 thereafter, I don't think we updated it formally in --
6 Q. Let me -- let me help you there --	6 Q. Let me ask you --
7 A. Okay.	7 A. -- the context of a Word document.
8 Q. -- just so there are no surprises.	8 Q. Let me ask the question in a slightly different
9 If you look at the fourth page in, it has the	9 way.
10 number ending 703 in the corner. Down at the bottom it	10 A. Yeah.
11 says [REDACTED]	11 Q. Did the business plan that you were working on
12 [REDACTED]	12 in the summer of '98 get to a point where you finished
13 A. Uh-huh.	13 working on it in a format that you handed out to
14 Q. And I think earlier we established the Series B	14 investors?
15 financing closed around the November --	15 A. Yes.
16 A. November.	16 Q. Okay. I'll refer to that as the final business
17 Q. -- time frame, and the Series A was in June.	17 plan.
18 A. Yes.	18 A. Okay.
19 Q. So that dates this document somewhere in	19 Q. Okay?
20 between. Correct?	20 Once you started handing out to investors, you
21 A. That's a good assumption.	21 weren't changing it. Correct?
22 Q. Okay. What was the purpose of writing the	22 A. That's correct.

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<p>1 Q. And could anybody be an investor in the 2 Series B financing?</p> <p>3 A. No. We --</p> <p>4 Q. You had to qualify in some way?</p> <p>5 A. A couple things. One is we wanted the best -- 6 we wanted value-added investors, and so that was 7 important for us. So we were looking for high quality 8 venture firms that wanted to participate with us in the 9 growth of this company.</p> <p>10 Q. Okay. To whom did you hand out the business 11 plan?</p> <p>12 A. It was a select number of people, a handful of 13 people. And I think primarily venture capitalists.</p> <p>14 Q. Were they required to sign any NDA or anything 15 like that with respect to a business plan?</p> <p>16 A. To the best of my recollection, they did.</p> <p>17 Q. Okay. Which obligated them not to disclose the 18 information to others?</p> <p>19 A. Yes.</p> <p>20 And I also think that we had a non-confidential 21 version also for those that didn't sign -- if somebody 22 wanted to look at it, I think at some point we developed</p>	<p>1 Q. Is it true that as you envisioned the 2 ArrayMatrix format in the June through November 1998 time 3 frame, that format permitted many millions of assays to 4 be carried out in parallel on a single well plate?</p> <p>5 A. I think that's an accurate statement.</p> <p>6 Q. Okay.</p> <p>7 A. 96 times 1536 times -- well, 96 times 40,000 8 would get you many millions.</p> <p>9 Q. Okay. And in the same time frame of June to 10 November of 1998, you understood that with the 11 ArrayMatrix format -- there's a fly.</p> <p>12 A. That's bizarre.</p> <p>13 Q. I'll start over.</p> <p>14 In the June through November 1998 time frame, 15 did you understand that with the ArrayMatrix format, that 16 detection methods could be massively parallelled?</p> <p>17 MR. COSTAKOS: Objection. Form.</p> <p>18 THE WITNESS: No, I didn't.</p> <p>19 Just to make sure that we're on the same page, 20 the detection method I'm thinking about is the 21 instrument. Are you thinking about something --</p> <p>22 MR. SHULMAN: No. I meant -- I meant the --</p>
<p style="text-align: center;">Page 102</p> <p>1 a non-confidential version, but I don't recollect that 2 version -- I think the confidential version was the one 3 that went to the venture capitalists. And I can't even 4 remember if there's anybody that we distributed the 5 non-confidential version to.</p> <p>6 Q. Okay. And does the -- what we've called the 7 final business plan still exist at Illumina?</p> <p>8 A. I have no idea. So the only place it existed 9 might have been in my hard drive and maybe in other 10 people's, but I don't have -- I don't have a copy, a hard 11 copy. I don't have a clue whether the venture guys have 12 a copy, and I don't have a clue whether Illumina has a 13 copy.</p> <p>14 Q. Okay.</p> <p>15 A. Other than the one you've been able to produce</p> <p>16 Q. Is it correct that as you envisioned the 17 ArrayMatrix format in the mid-1998 time frame --</p> <p>18 A. Okay.</p> <p>19 Q. -- mid being --</p> <p>20 A. June and later.</p> <p>21 Q. In the June and November time frame.</p> <p>22 A. Okay.</p>	<p style="text-align: center;">Page 104</p> <p>1 the -- performing the assay tests.</p> <p>2 THE WITNESS: Massively parallel meaning --</p> <p>3 MR. COSTAKOS: Objection.</p> <p>4 THE WITNESS: -- you could do, for instance, 5 96 samples in parallel?</p> <p>6 BY MR. SHULMAN:</p> <p>7 Q. And, as you said, 10 million tests?</p> <p>8 A. And -- yeah, okay. Yeah, sure.</p> <p>9 Q. Okay. And in the summer of '98 toward the June 10 and November time frame of '98, you envisioned that as 11 many as 1536 fiber bundles with thousands of tests per 12 bundle could be simultaneously dipped or inserted into 13 the separate wells of a 1536 well microtiter plate.</p> <p>14 Correct?</p> <p>15 A. That was one idea we had. It turned out to not 16 be something that we could -- we could reduce to actually 17 reduce to a product.</p> <p>18 Q. Okay. And in this June to November 1998 time 19 frame, you understood that the readout of target analytes 20 that bind to the beads in each strand of the bundles 21 could be performed by a single CCD camera. Correct?</p> <p>22 MR. COSTAKOS: Objection. Form.</p>

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<p>1 THE WITNESS: Yes and no. So let me -- let me 2 make sure I answer this a little bit more carefully. 3 A single CCD camera couldn't take one image of 4 the entire plate and produce that kind of data, but what 5 you could do is serially take pictures on each of the 6 bundles. And so the -- the readout -- the 7 instrumentation wasn't parallelized or wasn't taking one 8 image. It was taking 96 images in the case of a 9 96-bundle ArrayMatrix.</p> <p>10 BY MR. SHULMAN:</p> <p>11 Q. Okay. How many bundles could you image on a 12 CCD camera at once?</p> <p>13 A. One.</p> <p>14 Q. That's what you envisioned back then?</p> <p>15 A. Yes.</p> <p>16 Q. Okay. Now, you mentioned that you know a man 17 by the name of Dr. Kirk. Right?</p> <p>18 A. Yes.</p> <p>19 Q. Okay. And how did you come to know Dr. Kirk?</p> <p>20 A. He used to work with somebody at Caliper 21 Technologies. Caliper was a company that was founded by 22 Larry Bock and others. And they -- part of the</p>	<p>1 on, was the technology worthwhile, then is the technology 2 licensable, and then as I started to get some visibility 3 that we'd get a license done with Tufts, I was starting 4 to think about the team.</p> <p>5 And so -- but -- but recruiting didn't end in 6 the first four months or begin in the first four months 7 and end in the four months. Recruiting was a non-stop 8 process --</p> <p>9 MR. SHULMAN: I understand.</p> <p>10 THE WITNESS: -- that went beyond that time 11 point.</p> <p>12 BY MR. SHULMAN:</p> <p>13 Q. But certainly during those first four months of 14 '98, recruiting was one of the efforts that you were 15 engaged in?</p> <p>16 A. Soft recruiting in the first part because I 17 don't think we had reached terms in the early part of 18 January with -- with Tufts, and so -- or MBRI, which was 19 representing Tufts. And so it was kind of a 20 hypothetical. If we start this company, would you have 21 any interest? And so it wasn't a serious recruiting or 22 trying to hire somebody. It was always conditional on</p>
<p>Page 106</p> <p>1 management team was a person named Wally Parse, and it 2 was already founded when I joined Larry. 3 I helped Caliper with a lot of its business 4 development and corporate strategy and things like 5 licensing and things like that. So I got to know the 6 management team.</p> <p>7 And as we were thinking about building a team 8 for Illumina, I went to Wally and Larry and asked them, 9 you know, for their list of people that I should talk to. 10 They provided me with Greg Kirk's name.</p> <p>11 Q. Okay.</p> <p>12 A. Greg had worked with Wally at Molecular 13 Devices. And Greg had gone on to be part of 14 Pharmacopeia.</p> <p>15 Q. Okay. And is it correct that during the first 16 five months of 1998, you were seeking out qualified 17 scientists and other individuals to join Illumina after 18 it was formed? First four months, I guess.</p> <p>19 A. Yes.</p> <p>20 MR. COSTAKOS: Objection. Form.</p> <p>21 THE WITNESS: So, you know, gradually -- these 22 things are all transition. So first I was concentrating</p>	<p>Page 108</p> <p>1 the company going forward.</p> <p>2 Q. And as you got into the March and April time 3 frame, the recruiting efforts became more focused and 4 more serious?</p> <p>5 A. Yes. Because at that point there was better 6 visibility that we'd actually license the technology and 7 form a company around it.</p> <p>8 Q. And as part of that effort to -- of recruiting 9 people, you had some communications with Dr. Kirk. 10 Correct?</p> <p>11 A. Yes.</p> <p>12 Q. Okay.</p> <p>13 A. We tried to recruit him.</p> <p>14 Q. Right.</p> <p>15 Why did you try and recruit him?</p> <p>16 A. Based upon the recommendations of Wally Parse, 17 who I mentioned. And also I believe Larry Bock had 18 continuing interactions with Greg because when Greg -- 19 Larry helped found Pharmacopeia and was on the board 20 still at Pharmacopeia, and Greg had transitioned over to 21 Pharmacopeia. So Greg knew him from Pharmacopeia, too.</p> <p>22 Q. Okay.</p>

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<p>1 A. Larry knew Greg from Pharmacopeia, so it was 2 based upon the recommendations of those two people 3 primarily.</p> <p>4 MR. SHULMAN: Okay. Let me ask the reporter to 5 please mark as Exhibit 6 a document bearing production 6 Nos. AFMX 1808310 through 8314. 7 (Exhibit 6 was marked.)</p> <p>8 BY MR. SHULMAN:</p> <p>9 Q. Do you recognize this as an email from Dr. Kirk 10 to yourself dated January 7, 1998?</p> <p>11 A. I'm reading it right now. It's certainly 12 likely to be -- I don't have any specific recollection of 13 this email outside of the fact that I'm looking at it, 14 but I have no doubt that Greg sent it to me and we were 15 talking about these kinds of subjects.</p> <p>16 Q. Okay. And do you have any doubt that --</p> <p>17 A. I don't know if that makes sense.</p> <p>18 Q. -- you read it on or about the date it bears?</p> <p>19 A. I assume I read it within a day or so of 20 receiving it.</p> <p>21 Q. Was it your practice to read emails that 22 arrived in your inbox?</p>	<p>1 I -- you and he had at Newark airport. Right?</p> <p>2 A. Let me read this.</p> <p>3 Q. EWR is the abbreviation for Newark airport.</p> <p>4 MR. COSTAKOS: Really?</p> <p>5 THE WITNESS: Okay. I do remember, not great, 6 but do I remember that Greg and I met at the Newark 7 airport.</p> <p>8 BY MR. SHULMAN:</p> <p>9 Q. Okay. And why were you meeting with him at 10 this point?</p> <p>11 A. For recruiting purposes.</p> <p>12 Q. And what did you discuss at the Newark airport?</p> <p>13 A. I barely remember the meeting, but I'm pretty 14 sure we discussed the Walt technology and some of our 15 plans for trying to turn that into a new company.</p> <p>16 Q. And what did -- what specifically did you 17 discuss about the Walt technology during this meeting.</p> <p>18 A. I don't remember anything specific about what 19 discussed.</p> <p>20 Q. Nothing at all?</p> <p>21 A. I can just barely remember that we had the 22 meeting.</p>
<p style="text-align: center;">Page 110</p> <p>1 A. Yes. That's why I assume that I read this one.</p> <p>2 Q. And I was thinking about this the other day. 3 When you were at CW, what email software did 4 you use? Was it Microsoft Office-based or Microsoft 5 Outlook?</p> <p>6 A. No. We were using Macs.</p> <p>7 Q. Okay.</p> <p>8 A. And I can't even remember what software we 9 used. I know before CW, we just -- we used Yahoo. And 10 then after CW Group, I'm not quite sure what -- I'm not 11 quite sure.</p> <p>12 Q. Okay. But when you opened up your inbox, it 13 would list the emails --</p> <p>14 A. Sure.</p> <p>15 Q. -- that you had received and the subject matter 16 if there happened to be a subject matter in the header 17 field?</p> <p>18 A. Yes.</p> <p>19 Q. So by this email, Dr. Kirk was sending you his 20 CV. Correct?</p> <p>21 A. Correct.</p> <p>22 Q. And this followed a discussion that you and</p>	<p style="text-align: center;">Page 112</p> <p>1 Q. And your reference to going to -- or his 2 reference, rather, to going to -- going to Boston and 3 wishing you good luck, was that on the negotiation with 4 Tufts?</p> <p>5 A. Again, probably, but I don't really remember.</p> <p>6 Q. Okay. Was this meeting in the Newark airport 7 the first time you had met Dr. Kirk?</p> <p>8 A. I think it was.</p> <p>9 Q. And what impression did he create in your mind 10 about his abilities in the prospective area that you were 11 looking into?</p> <p>12 A. He seemed like a candidate that we wanted to 13 keep on the list and that, you know, I was excited that 14 he'd consider joining us.</p> <p>15 MR. SHULMAN: Okay. Let me mark as Exhibit 7 16 an email from Dr. Stuelpnagel to Greg Kirk bearing 17 production No. AFMX 1808309. 18 (Exhibit 7 was marked.)</p> <p>19 BY MR. SHULMAN:</p> <p>20 Q. Are you the John Stuelpnagel that's indicated 21 as the signator on this email?</p> <p>22 A. Be a really good guess.</p>

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<p>1 Q. Okay. And you appear to have sent it from 2 Larry Bock's inbox. Do you see that? Or Larry Bock's 3 email address?</p> <p>4 A. That's weird. It may be an artifact of -- I'm 5 assuming you received these from Greg Kirk, and it may 6 have been how he introduced my name into his Outlook.</p> <p>7 Q. Right.</p> <p>8 A. I know this not because I was working in 9 Outlook in 1998, but in subsequent relationships with 10 email at Illumina, I know that depending on how you put 11 your contact in, it will automatically put a name in.</p> <p>12 Q. Ah.</p> <p>13 A. So my guess is that I sent it from my inbox 14 because I didn't have access to Larry's inbox, and that 15 someone -- Greg -- put me under Larry's name, and so it 16 showed up as Larry.</p> <p>17 Q. Okay.</p> <p>18 A. So I'd be pretty -- I'd be pretty surprised if 19 this was sent from Larry's email box. I think it was 20 probably sent from mine and miscategorized by Greg's 21 email system.</p> <p>22 Q. Okay.</p>	<p>1 I think I've learned about the one that's going to be 2 shown to you by Illumina's counsel. They showed it to me 3 about three weeks ago, two, three weeks ago.</p> <p>4 Q. What email is that?</p> <p>5 A. One from Greg in which he has already gone to 6 the Walt lab and expressed some ideas that he had after 7 going to the Walt lab.</p> <p>8 Q. Okay. When did you first see that email?</p> <p>9 A. About three weeks ago.</p> <p>10 Q. Never saw it before?</p> <p>11 A. I'm sure I saw it before. I have no 12 recollection of that email prior to -- to -- or 13 particularly the subject in that email prior to seeing it 14 again three weeks ago.</p> <p>15 MR. SHULMAN: Okay. Let me mark as Exhibit 8 a 16 January 9, 1998, email from Dr. Kirk to Dr. Stuelpnagel.</p> <p>17 And we need to take a break because we're out 18 of tape.</p> <p>19 (Exhibit 8 was marked.)</p> <p>20 VIDEOGRAPHER: This is the end of disk no. 1 of 21 Volume I. We're off the record at 12:10 p.m.</p> <p>22 (Recess.)</p>
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<p>1 A. Program.</p> <p>2 Q. And you were responding to his email of 3 January 7, Exhibit 6?</p> <p>4 A. Oh, I -- they have the same subject; so I would 5 say that's a pretty good guess, but I don't have any 6 recollection of how they were related today.</p> <p>7 Q. And you thanked him for the introduction to 8 Nancy Gray, which is one of the subjects of his email?</p> <p>9 A. Again, all consistent. I just don't -- don't 10 remember personally, but it's all consistent, so I don't 11 want to argue the point.</p> <p>12 Q. Okay. And you told him that you would be in 13 touch and you had made some progress in Boston. Correct?</p> <p>14 A. Yes.</p> <p>15 Q. And did you stay in touch with him?</p> <p>16 A. I believe we did have further communication 17 after that.</p> <p>18 Q. Okay. Do you have any of these emails in your 19 possession?</p> <p>20 A. No, I don't.</p> <p>21 Q. How did you learn about these emails?</p> <p>22 A. I learned -- I didn't learn about these at all.</p>	<p>1 VIDEOGRAPHER: This is the beginning of disk 2 No. 2 of Volume I. We're on the record at 12:19 p.m.</p> <p>3 BY MR. SHULMAN:</p> <p>4 Q. Would you look, please, at Exhibit 8. And you 5 see at the bottom of this email chain, there is 6 Dr. Kirk's response to you?</p> <p>7 A. Yes.</p> <p>8 Q. And you received this on or about the date that 9 it bears?</p> <p>10 A. Probably, yes.</p> <p>11 Q. Okay. You don't have any doubt that you read 12 it at the time?</p> <p>13 A. I assume I did.</p> <p>14 Q. Okay. And he refers -- and he's -- he refers 15 to the fact that he's still thinking about 16 encoding-decoding strategies, both from a collaboration, 17 existing IP viewpoint, and with respect to brand new 18 ideas. Were you and he discussing ideas about the Walt 19 technology in this time frame?</p> <p>20 A. The only recollection I have is that there -- 21 obviously there was some emails going back and forth. 22 don't really remember having a lot of telephone</p>

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<p>1 conversations. I remember the one meeting at Newark, and 2 beyond that, I don't remember if there was any other -- 3 just a long time ago.</p> <p>4 Q. Okay. But seeing this reference to thinking of 5 new strategies and ideas, does this refresh your 6 recollection that you and he were engaged in discussions, 7 perhaps not very extensive, but discussions about how 8 this Walt technology might be implemented?</p> <p>9 A. Well, and not limited to him. I was talking to 10 lots of people about what I saw as the limitation to the 11 Walt technology, which was around encoding-decoding.</p> <p>12 Q. Okay.</p> <p>13 A. So it was probable -- in fact, this supports 14 that guess -- that I also talked to Kirk, but I don't 15 have a list of all the people I talked to about encoding 16 and decoding strategies.</p> <p>17 Q. But you were talking to him and others about 18 that?</p> <p>19 A. To my best recollection, I was talking to lots 20 of people, and this email supports the fact that I talked 21 to him about it.</p> <p>22 MR. COSTAKOS: Okay. Let's mark as Exhibit 9 a</p>	<p>1 you received it?</p> <p>2 MR. COSTAKOS: Objection. Form.</p> <p>3 THE WITNESS: I think I answered that. I have 4 no idea whether I -- I assume I received it, but there is 5 a small probability that I didn't receive it.</p> <p>6 BY MR. SHULMAN:</p> <p>7 Q. I understand that. I'm saying, are you 8 presently aware of any reason why you doubt that you did 9 receive this document?</p> <p>10 A. No.</p> <p>11 Q. Okay.</p> <p>12 A. I answered that one, correct.</p> <p>13 Q. Okay. And are you presently aware of any 14 reason that would cause you to doubt that you read the 15 document at the time?</p> <p>16 A. If I had received it, which I think I did, I 17 just am not going to say absolutely that I received it. 18 And so if I struggle and appear argumentative, I'm no 19 trying to. I'm trying to be --</p> <p>20 Q. I understand.</p> <p>21 A. -- correct in how I answer the questions.</p> <p>22 Q. So is it correct that you don't have any</p>
<p style="text-align: center;">Page 118</p> <p>1 January 12, 1998, letter from Dr. Kirk to 2 Dr. Stuelpnagel. 3 (Exhibit 9 was marked.)</p> <p>4 BY MR. SHULMAN:</p> <p>5 Q. Did you receive this letter on or about the 6 date that it bears?</p> <p>7 A. Yeah, I have no recollection of receiving this. 8 I assume that I did receive it. I don't know whether I 9 received it by mail or as attachment to an email. I just 10 don't know.</p> <p>11 Q. Okay.</p> <p>12 A. I have no recollection.</p> <p>13 Q. But you have no doubt that you received it and 14 reviewed it at or about the time that it was written?</p> <p>15 A. I guess because I didn't -- don't have any 16 recollection that I received it, I just don't know, but I 17 don't have any reason to assume that I didn't receive it.</p> <p>18 Q. Okay. Fair enough.</p> <p>19 A. You know, I struggle over 20 no-doubt-that-I-read-it language that was implied in your 21 question, and I just don't know that.</p> <p>22 Q. Okay. You don't have any reason to doubt that</p>	<p style="text-align: center;">Page 120</p> <p>1 present reason to doubt that you read this document?</p> <p>2 A. I can answer yes to that one.</p> <p>3 MR. SHULMAN: Okay. Let's mark as Exhibit 10 4 another email, this one from Dr. Stuelpnagel to Greg Kirk 5 dated January 20 of 1998. 6 (Exhibit 10 was marked.)</p> <p>7 BY MR. SHULMAN:</p> <p>8 Q. Did you send this email to Dr. Kirk on or about 9 the date that it bears?</p> <p>10 A. I'm reading it to --</p> <p>11 Q. Sure.</p> <p>12 A. So -- excuse me. I'm just trying to see what's 13 in this email.</p> <p>14 So it appears that I sent it. I don't have any 15 reason to not believe I sent it, and I think I probably 16 did send it.</p> <p>17 Q. Okay. And it appears to be responding to the 18 letter of January 12, Exhibit 9, where he enclosed his 19 IBC talk for which you thanked him in Exhibit 10. 20 Correct?</p> <p>21 A. Appears so, yes.</p> <p>22 Q. Okay. Now, in the first paragraph of</p>

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<p>1 Exhibit 10, last sentence, you referred to the fact that 2 when the negotiations with Tufts are complete, you would 3 like to get Dr. Kirk together with Dr. Walt. Do you see 4 that?</p> <p>5 A. I see that.</p> <p>6 Q. Why did you want to get them together?</p> <p>7 A. As part of Greg's due diligence about whether 8 he wanted to join the company and our due diligence 9 whether he was the right person, it seemed like a meeting 10 between David Walt and Greg Kirk would have been 11 something I would have recommended.</p> <p>12 Q. Okay. And were you trying to interest him in 13 the technology?</p> <p>14 A. Yes. Because we were trying to recruit him.</p> <p>15 Q. Okay. And you were asking him for his thoughts 16 at least about the optical coding --</p> <p>17 A. Yes.</p> <p>18 Q. -- issue. Correct?</p> <p>19 A. Appears so.</p> <p>20 Q. Okay. And you also asked him for 21 recommendations for potential scientific advisory board 22 members. Correct?</p>	<p>1 Achilles heel of the Walt technology.</p> <p>2 Q. Okay. And so were you looking from these 3 people that you were, you know, trying to interest in 4 joining Illumina for their feedback on what they thought 5 about the Walt technology?</p> <p>6 A. Yeah, but not exclusively them.</p> <p>7 Q. I'm not suggesting that.</p> <p>8 A. Also -- yeah, yeah. So I was talking -- like I 9 mentioned before, I've talked to lots of experts around 10 the world trying to find out if there's other 11 technologies we could bring in.</p> <p>12 Q. So you were interested in what Dr. Czarnik had 13 to say about the Walt technology as well as Dr. Chee and 14 Mr. Auger and Dr. Kirk and others?</p> <p>15 A. Dr. Still and Dr. Whitesides. So what I want 16 to do is not try to leave the impressions that I was only 17 talking to these things about people we were recruiting.</p> <p>18 Q. Right. And I take it that in addition to being 19 interested in getting Dr. Kirk's feedback on the Walt 20 technology, you were interested in having him move to the 21 west coast and join Illumina should Illumina be formed?</p> <p>22 A. At some point we decided to put Illumina on the</p>
<p style="text-align: center;">Page 122</p> <p>1 A. Yes.</p> <p>2 Q. Okay. Was it important for you to have him 3 meet Dr. Walt and see what was in his lab?</p> <p>4 MR. COSTAKOS: Objection. Form.</p> <p>5 THE WITNESS: If he was going to proceed as a 6 potential candidate for joining the company, I think it 7 was very important.</p> <p>8 BY MR. SHULMAN:</p> <p>9 Q. Okay. And at this point he was expressing 10 interest in at least exploring that possibility. Right?</p> <p>11 A. To the best of my recollection and supported by 12 the emails that you've given to me.</p> <p>13 Q. Okay. And did you -- were you looking for 14 feedback on the technology from these various candidates 15 that you were enticing, for lack of a better term, to 16 join Illumina?</p> <p>17 A. I don't know if -- you know, "enticing" is a 18 little -- I don't know what that means. But in terms of 19 the people that I were -- I was talking to about 20 potential jobs at Illumina and joining me as a 21 co-founder, I often ask them about technology solutions 22 to, again, what I testified before was, I think, the</p>	<p style="text-align: center;">Page 124</p> <p>1 west coast, but I don't know if that decision had been 2 made in the time frame in which these emails are being 3 transferred.</p> <p>4 Q. Okay. Let me rephrase the question.</p> <p>5 A. Yeah.</p> <p>6 Q. In addition to being interested in getting 7 Dr. Kirk's as well as these other folks' feedback on the 8 technology, were you also interested in having Dr. Kirk 9 join Illumina after it was formed?</p> <p>10 A. Yes.</p> <p>11 Q. Okay. And there came a point in time when 12 Dr. Kirk made the decision to remain on the east coast 13 and not join Illumina. Correct?</p> <p>14 A. Yes.</p> <p>15 Q. And by early May of 1998, he had informed you 16 of that decision, and you were disappointed. Correct?</p> <p>17 A. I can't remember the exact timeline, but I 18 remember thinking that that was disappointing.</p> <p>19 MR. SHULMAN: Let me show you what we'll mark 20 as Exhibit 11, an email from you to Dr. Kirk dated May 4, 21 1998, bearing production No. AFMX 1808301.</p> <p>22 (Exhibit 11 was marked.)</p>

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<p>1 BY MR. SHULMAN:</p> <p>2 Q. Do you recognize this as an email you sent to</p> <p>3 Dr. Kirk on or about May 4, 1998?</p> <p>4 A. All of that is consistent. I don't have any</p> <p>5 clear recollection of sending the email, but I have no</p> <p>6 reason to doubt that I did.</p> <p>7 Q. Okay. And this happens to have an address for</p> <p>8 you. Is this the Cardiff office?</p> <p>9 A. It would be.</p> <p>10 Q. At 2187 Newcastle Avenue?</p> <p>11 A. Yes.</p> <p>12 Q. Okay. Why were you disappointed in Dr. Kirk's</p> <p>13 decision to remain on the east coast?</p> <p>14 A. Because I think he would have been a good</p> <p>15 addition to Illumina.</p> <p>16 Q. And why did you believe he would have been a</p> <p>17 good contributor to the Illumina team?</p> <p>18 A. He came highly recommended. My -- as best I</p> <p>19 can remember, my interactions with him were all positive</p> <p>20 he seemed like a good team player and had a good track</p> <p>21 record.</p> <p>22 Q. And was your belief based, in part, on any</p>	<p>1 Let me mark for identification as Exhibit 12 a</p> <p>2 two-and-a-half-page, single-spaced email from Dr. Kirk to</p> <p>3 Dr. Stuelpnagel dated March 9, 1998, and bearing</p> <p>4 production Nos. AFMX 1808304 through 8306.</p> <p>5 (Exhibit 12 was marked.)</p> <p>6 BY MR. SHULMAN:</p> <p>7 Q. You've seen this email before. Correct?</p> <p>8 A. I saw this about three weeks ago, and I had --</p> <p>9 you know, I'm not going to deny that I probably saw it</p> <p>10 somewhere around the time it was sent to me, too.</p> <p>11 Q. Okay. So --</p> <p>12 A. I just don't remember.</p> <p>13 Q. -- you don't have any reason to doubt, as you</p> <p>14 sit here today, that you did receive this email on or</p> <p>15 about March 9?</p> <p>16 A. That's correct.</p> <p>17 Q. And you don't have any reason to doubt, as you</p> <p>18 sit here today, that you read the email on or about the</p> <p>19 time that you received it?</p> <p>20 A. I assume I did, yes.</p> <p>21 MR. COSTAKOS: Form.</p> <p>22 BY MR. SHULMAN:</p>
<p style="text-align: center;">Page 126</p> <p>1 feedback you had received from him about ideas for</p> <p>2 Illumina?</p> <p>3 A. I can't remember whether that would have</p> <p>4 influenced my decision. I think I was already interested</p> <p>5 in him based upon his reputation.</p> <p>6 Q. Okay. Let's look again at Exhibit 10, the end</p> <p>7 of the first paragraph where you stated that you wanted</p> <p>8 to get Kirk and Walt together. Do you see that?</p> <p>9 A. Yes, I do see that.</p> <p>10 Q. Did you ever arrange to get them together?</p> <p>11 A. To the best of my recollection, they did meet.</p> <p>12 Q. Okay. And did you arrange for that to happen?</p> <p>13 A. I probably helped facilitate it in some way,</p> <p>14 but they did their own scheduling --</p> <p>15 Q. Okay.</p> <p>16 A. -- I suspect. I don't know.</p> <p>17 Q. And did you ever get Dr. Kirk's feedback on the</p> <p>18 Walt technology?</p> <p>19 A. I had no remembrance of that until I recently</p> <p>20 saw an email that I'm sure you'll show me, too, but in</p> <p>21 that email, it appears that I did get his feedback.</p> <p>22 MR. SHULMAN: Okay. Let's look at that email.</p>	<p style="text-align: center;">Page 128</p> <p>1 Q. Okay. And you see that the subject of the</p> <p>2 email is "Feedback from Thursday meeting at Tufts."</p> <p>3 Right?</p> <p>4 A. Yes.</p> <p>5 Q. And Tufts was where Dr. Walt worked. Right?</p> <p>6 A. Correct.</p> <p>7 Q. Now, let's look at the substance of Dr. Kirk's</p> <p>8 email. According to the header of the email, March 9,</p> <p>9 1998, was a Monday. Do you see that?</p> <p>10 A. Yes, I do.</p> <p>11 Q. And the subject matter addressed in the email</p> <p>12 is Dr. Kirk's feedback from his meeting at Tufts in</p> <p>13 Dr. Walt's lab that was held on Thursday. Do you see</p> <p>14 that?</p> <p>15 A. I do.</p> <p>16 Q. Okay. And did you arrange for this meeting in</p> <p>17 the manner that you described earlier?</p> <p>18 A. This would have been the meeting that I think I</p> <p>19 arranged.</p> <p>20 Q. Okay.</p> <p>21 A. Or at least facilitated.</p> <p>22 Q. And why did you arrange or facilitate this</p>

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1 meeting?	1 halfway down?
2 A. As we discussed before, it was primarily a due	2 A. Yes.
3 diligence on both sides. One is to have Greg become more	3 Q. Okay. There he told you in the first sentence
4 familiar with the technology. The other is to have David	4 that with this Walt technology, the detection methods can
5 Walt assess Greg's technical competence.	5 be massively parallel. Do you see that?
6 Q. Okay. And do you know who accompanied Dr. Kirk	6 A. Yes.
7 on his visit to the Walt lab in March of '98?	7 Q. And in the second sentence, Dr. Kirk then
8 A. I have no idea.	8 explained to you what he meant by massively parallel --
9 Q. I take it you did not?	9 A. Yes.
10 A. To the best of my memory, I did not.	10 Q. -- when he stated, for instance, 15 -- and I'm
11 Q. Okay. And Mr. Bock did not, as far as you	11 quoting, "For instance, 1536 fiber bundles with up to
12 know?	12 6,000 tests can be fixtured to perform simultaneous
13 A. As far as I know.	13 testing of all wells in our new 1536 microliter meter
14 Q. Okay. And this email was directed to Mr. Bock	14 well plates," exclamation point. Do you see that?
15 as well. Correct?	15 A. Yes.
16 A. Correct.	16 Q. And in the sentence that I just read, Dr. Kirk
17 Q. Okay. And you and he shared an office in	17 emphasized that the testing can be done simultaneously in
18 Cardiff. Right?	18 all wells by typing the word "all" in capital letters and
19 A. Correct.	19 using an exclamation point at the end of the sentence.
20 Q. Now, apart from what's reported in this email,	20 Do you see that?
21 do you have any information about what transpired during	21 MR. COSTAKOS: Objection. Form.
22 Dr. Kirk's visit to the Walt lab in March of '98 or what	22 THE WITNESS: Yes.
Page 130	Page 132
1 he thought about what he saw during that visit?	1 BY MR. SHULMAN:
2 A. No.	2 Q. Okay. And after Dr. Kirk informed you of his
3 Q. Okay. Now, if you look at page 1 of this	3 emphasized idea in March of 1998, you claimed to have
4 email, if you count down eight paragraphs, begins --	4 originated the same idea months later after taking a run
5 MR. COSTAKOS: The one that begins with the	5 in San Diego. Correct?
6 word "first"?	6 MR. COSTAKOS: Objection. Form.
7 MR. SHULMAN: Correct.	7 THE WITNESS: I would not agree to that, no.
8 BY MR. SHULMAN:	8 BY MR. SHULMAN:
9 Q. There Dr. Kirk stated that he wanted to share	9 Q. Okay. How is Dr. Kirk's emphasized idea that
10 with you some of his brainstorming ideas about the Walt	10 he communicated to you in March of 1998 any different
11 technology that he had discussed with a scientific	11 than the testimony that appears at page 1035 beginning at
12 colleague over the weekend between the lab visit and the	12 line 15 through 1037, line 1, of your trial testimony?
13 date of the email. Do you see that?	13 A. Yes.
14 A. Yes.	14 MR. COSTAKOS: Objection. Form.
15 Q. So Kirk's visit to Walt's lab must have been on	15 THE WITNESS: So the trial testimony was around
16 the Thursday before this Monday, March 9. Correct?	16 a particular exhibit, if I recall our review of it today.
17 A. Yes.	17 It was around the specific product that would become the
18 Q. Okay. Now, let's look at some of Dr. Kirk's	18 product -- Illumina's first product. And that's what --
19 ideas that he described and disclosed to you in this	19 that was part of the brainstorming session. I don't
20 March 9 email.	20 think it's clear that the same product that we developed
21 If you look at the first page of the email, the	21 is that which he's describing here.
22 paragraph that has the number three in front of it about	22 BY MR. SHULMAN:

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<p>1 Q. You didn't have a product in the summer of '98, 2 did you?</p> <p>3 A. We had a product idea, a product concept 4 in summer of '98.</p> <p>5 Q. You had an idea. Right?</p> <p>6 A. Yes.</p> <p>7 Q. Okay. You didn't have a product?</p> <p>8 MR. SHULMAN: Objection. Form.</p> <p>9 THE WITNESS: That's right.</p> <p>10 BY MR. SHULMAN:</p> <p>11 Q. Okay. And so how is the idea that you 12 described at page 1035 through 1037 -- how is that idea 13 any different than the idea that Dr. Kirk informed you of 14 months earlier?</p> <p>15 MR. COSTAKOS: Objection. Form.</p> <p>16 THE WITNESS: So I'm not going to argue that 17 they're similar -- they're not similar because they are, 18 but here it's not clear to me how you would fixture all 19 of those. And then when I read on, the idea of 1536 is 20 not a practical one, and that the readout on one high 21 resolution CCD chip would never work. Furthermore, the 22 1536 fiber bundles with 6,000 tests depends on what he</p>	<p>1 A. So I'm --</p> <p>2 MR. COSTAKOS: Wait. Hold on. I'm going to 3 object --</p> <p>4 THE WITNESS: Yeah.</p> <p>5 MR. COSTAKOS: -- because we've been through 6 this before and the unfairness of taking that testimony 7 out of context, and we spent a great deal of time about 8 that specific issue before. So I think the question is 9 improper.</p> <p>10 You can go ahead and answer how you see fit.</p> <p>11 THE WITNESS: Well, I'm really confused because 12 what I testified to was a product, and how we came up 13 with the product, and it's a specific context. And now 14 you're asking me not to describe it in context of the 15 product, that line 15 was about a specific exhibit which 16 was our Sentrix ArrayMatrix.</p> <p>17 BY MR. SHULMAN:</p> <p>18 Q. Sir, let's look at line --</p> <p>19 A. So when you asked me to do -- say what's 20 different and I say the product's different what Greg 21 describes here, and then you tell me not to use that as a 22 frame of reference, I'm totally confused by what you're</p>
<p style="text-align: center;">Page 134</p> <p>1 means by tests because you have to have redundancy. You 2 would never be able to design a 1536 bundle with 6,000. 3 If he means unique tests, I just don't know what he means 4 there in a fiber bundle that's small enough to fit into a 5 1536 microtiter well plate. And so there's a lot of 6 differences between what became our product and the 7 description that Greg has here.</p> <p>8 BY MR. SHULMAN:</p> <p>9 Q. Okay. But I didn't ask you about your product. 10 I asked you about the differences between your 11 description that appears on page 1035 through 1037 and 12 the words that appear in this email. So let's put the 13 product out -- out of our minds for a moment and just 14 look at your testimony at page 1035, line 15, through 15 1037, line 1.</p> <p>16 MR. COSTAKOS: Well, hold on. Hold on.</p> <p>17 MR. SHULMAN: Excuse me.</p> <p>18 BY MR. SHULMAN:</p> <p>19 Q. What are the difference between -- in your 20 mind, between the words you chose to describe how you 21 arrived at the format and what Dr. Kirk said in this 22 email?</p>	<p style="text-align: center;">Page 136</p> <p>1 trying to accomplish.</p> <p>2 Q. Okay. Why don't you look at page 1035 of your 3 testimony --</p> <p>4 A. Okay.</p> <p>5 Q. This is Exhibit 2.</p> <p>6 MR. COSTAKOS: Which exhibit was it again?</p> <p>7 MR. SHULMAN: Exhibit 2.</p> <p>8 THE WITNESS: Exhibit 2.</p> <p>9 BY MR. SHULMAN:</p> <p>10 Q. Okay. Page 1035, at line 10, your lawyer said, 11 "Can you explain what Exhibit 2054 is?" I'm sorry. 12 Line 11. Do you see that?</p> <p>13 A. Yes.</p> <p>14 Q. Okay. And your response was, "Yes, this is our 15 Sentrix ArrayMatrix." Right?</p> <p>16 A. Yes.</p> <p>17 Q. Okay. And the Sentrix ArrayMatrix is a 18 product. Correct?</p> <p>19 A. Yes.</p> <p>20 Q. Okay. And then he asked you, "Can you describe 21 how the ArrayMatrix format was arrived at." Right?</p> <p>22 A. Yes.</p>

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<p>1 Q. He's asking you about the format. Right?</p> <p>2 A. I don't know what he means by format. I</p> <p>3 assumed he meant, you know, how did you come up with the</p> <p>4 product idea.</p> <p>5 Q. He asked you about the format, and he didn't</p> <p>6 even mention Sentrix in the question that appears at</p> <p>7 line 15. Correct?</p> <p>8 A. So maybe you can help define what format means</p> <p>9 in that question because all I can say is in the context</p> <p>10 in which I answered it several years ago.</p> <p>11 Q. Okay. And you didn't use the word "Sentrix" in</p> <p>12 your answer either, did you?</p> <p>13 A. I think I used ArrayMatrix, and I think we all</p> <p>14 knew what we were talking about. When I said</p> <p>15 ArrayMatrix, we were talking about Exhibit 2054. I'm</p> <p>16 really confused by your line of questioning because</p> <p>17 I'm -- I just -- I'm trying to be helpful here. I just</p> <p>18 don't know how to answer the question accurately with the</p> <p>19 way that you're taking it out of context.</p> <p>20 Q. Okay. Did your ArrayMatrix product that you</p> <p>21 eventually came out with many years later, did it have</p> <p>22 fiber bundles fixtured to perform simultaneous testing of</p>	<p>1 A. This one sentence.</p> <p>2 Q. And you would agree that that is very similar</p> <p>3 in concept to what you came up or claim to have come up</p> <p>4 with in the summer of '98?</p> <p>5 MR. COSTAKOS: Objection. Form.</p> <p>6 THE WITNESS: I think it is.</p> <p>7 BY MR. SHULMAN:</p> <p>8 Q. Okay. Now, according to Dr. Kirk's emphasized</p> <p>9 idea in this paragraph 3 of his email, each of the 1536</p> <p>10 fiber bundles that he envisioned would contain up to</p> <p>11 6,000 fiberoptic strands. Correct?</p> <p>12 A. That's not clear to me, so -- and I might -- if</p> <p>13 I can -- if you can give me some liberty to -- to talk</p> <p>14 about what I regard as a test, a test would be --</p> <p>15 Q. Well, let me help you out there --</p> <p>16 A. Okay.</p> <p>17 Q. -- before you go out a limb.</p> <p>18 If you look at page 2 of his email --</p> <p>19 A. Uh-huh.</p> <p>20 Q. -- halfway down there's a section Roman numeral</p> <p>21 II. Do you see that?</p> <p>22 A. Yes.</p>
<p style="text-align: center;">Page 138</p> <p>1 all wells in the well plate?</p> <p>2 A. Yes.</p> <p>3 Q. Okay. And that idea was communicated to you by</p> <p>4 Dr. Kirk in his email. Correct?</p> <p>5 MR. COSTAKOS: Objection. Form.</p> <p>6 THE WITNESS: But it's -- it's -- it's how</p> <p>7 they're fixtured and how they're put together that makes</p> <p>8 that a product. The same words are consistent with --</p> <p>9 BY MR. SHULMAN:</p> <p>10 Q. Okay.</p> <p>11 A. -- with -- with our product.</p> <p>12 Q. So that idea was communicated to you by</p> <p>13 Dr. Kirk --</p> <p>14 MR. COSTAKOS: Objection.</p> <p>15 BY MR. SHULMAN:</p> <p>16 Q. -- in March of '98. Correct?</p> <p>17 MR. COSTAKOS: Objection. Form.</p> <p>18 THE WITNESS: The idea that is listed here in</p> <p>19 the one sentence from Dr. Kirk was communicated to me, by</p> <p>20 all probability, somewhere around March of '90 -- 1998.</p> <p>21 BY MR. SHULMAN:</p> <p>22 Q. Okay.</p>	<p style="text-align: center;">Page 140</p> <p>1 Q. And then there's paragraph A?</p> <p>2 A. Yes.</p> <p>3 Q. And he says, in paragraph A, "I was excited to</p> <p>4 see how small and convenient each 6,000 member fiber</p> <p>5 bundle is."</p> <p>6 A. So it appears that -- you know, and I don't</p> <p>7 have any recollection of this email other than having</p> <p>8 seen it today and once before three weeks ago, but it</p> <p>9 seems to me that he defines test as a fiber bundle. And</p> <p>10 that's fine. There's -- there's different ways of</p> <p>11 defining tests; so I'll accept that definition.</p> <p>12 Q. It has a fiber in a fiber bundle?</p> <p>13 A. A fiber -- yes, 6,000 fibers in a fiber bundle.</p> <p>14 Q. So a test -- 6,000 tests is --</p> <p>15 A. 6,000 fibers --</p> <p>16 Q. -- fibers per bundle?</p> <p>17 A. -- is the way he is using the term. I'm not</p> <p>18 trying to quibble. I'm just saying people use those</p> <p>19 terms differently.</p> <p>20 Q. And collectively --</p> <p>21 A. I use those terms differently.</p> <p>22 Q. And collectively, the 6,000 strands in each</p>

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<p>1 bundle of the 1536 that he envisioned here was an array 2 of thousands of fiberoptic strands. Correct?</p> <p>3 A. Say that again.</p> <p>4 Q. Yes.</p> <p>5 Collectively --</p> <p>6 A. Yes.</p> <p>7 Q. -- the 6,000 fiberoptic strands in each bundle 8 that he envisioned was an array of thousands of 9 fiberoptic strands. Correct?</p> <p>10 MR. COSTAKOS: Objection. Form.</p> <p>11 THE WITNESS: If I'm following the question 12 correctly, yes.</p> <p>13 BY MR. SHULMAN:</p> <p>14 Q. Okay. And as described in Dr. Kirk's email, 15 the fiberoptic strands in each bundle could have a bead 16 loaded under their projecting end, and each bead could 17 have a different bioactive test agent. Correct?</p> <p>18 A. Correct.</p> <p>19 Q. And as described --</p> <p>20 A. So I -- wait. Let me -- I said "correct" too 21 quickly because I actually don't think that -- it's not a 22 correct implementation of the technology, and so unless</p>	<p>1 single fixture. Correct?</p> <p>2 MR. COSTAKOS: Objection. Form.</p> <p>3 THE WITNESS: Actually, it doesn't say that.</p> <p>4 It says that somehow they can be fastened together. You 5 inserted the word "single," and I wouldn't necessarily 6 say that I can infer that from his sentence here.</p> <p>7 BY MR. SHULMAN:</p> <p>8 Q. He said they could be combined into a fixture. 9 Right?</p> <p>10 A. No, he doesn't. He says that they could be 11 fixed to perform simultaneous testing. It's only one 12 sentence. We can't -- I mean, we can quibble about the 13 words, but let's just read it accurately and we then move 14 on. It's one sentence, paragraph 3, "1536 fiber bundles 15 with up to 6,000 tests can be fixed to perform 16 simultaneous testing of all wells in our new 1536 17 microtiter plate."</p> <p>18 Q. Okay. Now look at page 2.</p> <p>19 A. Okay.</p> <p>20 Q. Halfway down the page you see Roman numeral II, 21 the section that begins Roman numeral II?</p> <p>22 A. Yes.</p>
<p style="text-align: center;">Page 142</p> <p>1 he said that, which he might have, he would have been 2 wrong, but -- so, you know, again, I'm trying to adapt to 3 his nomenclature in an email that I haven't reviewed 4 today, so --</p> <p>5 Q. Look at paragraph 2 on page 1.</p> <p>6 A. Okay.</p> <p>7 Q. He says, "Test reagents can be loaded into 8 fibers as beads or as a chemical coding step."</p> <p>9 A. Yes.</p> <p>10 Q. Correct? Yes?</p> <p>11 A. Yes.</p> <p>12 Q. And he also told you that tests can be 13 performed by a simple dipping step. Right?</p> <p>14 A. Yes.</p> <p>15 Q. Okay.</p> <p>16 A. But how did that answer the question that -- 17 where I created some -- you created some confusion in my 18 mind.</p> <p>19 Q. I'm not worried about that. I got --</p> <p>20 A. Oh, okay.</p> <p>21 Q. And as described in Dr. Kirk's email, all 1536 22 arrays of fiberoptic bundles could be combined into a</p>	<p style="text-align: center;">Page 144</p> <p>1 Q. Okay. And then you see the subparagraph 2 labeled A?</p> <p>3 A. Okay. Yes.</p> <p>4 Q. Okay. And if you go down to the first, second, 5 third, fourth, fifth line down, last word, I'll read it 6 into the record.</p> <p>7 A. Okay.</p> <p>8 Q. "For instance, a low-cost fixture can be 9 fabricated that would arrange 1536 fiber bundles to line 10 up with the wells of one of the new Costar plates." Do 11 you see that?</p> <p>12 A. Yes, I do.</p> <p>13 Q. So as described in Dr. Kirk's email, all 1536 14 arrays of a fiberoptic bundle -- or fiberoptic bundles 15 could be combined into a single fixture. Correct?</p> <p>16 A. Appears so.</p> <p>17 Q. Okay. And when you combine all 1536 arrays 18 into a single fixture, what you end up with is an array 19 of 1536 arrays. Correct?</p> <p>20 MR. COSTAKOS: Objection. Form.</p> <p>21 THE WITNESS: You have an array of 1536 fiber 22 bundles.</p>

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<p>1 BY MR. SHULMAN:</p> <p>2 Q. Right. And each of those fiber bundles is, in 3 and of itself, an array of fiberoptic fibers. Right?</p> <p>4 A. Yes.</p> <p>5 Q. Okay. Now, let's look again at the email, 6 page 1, paragraph 3.</p> <p>7 A. Page 1, paragraph 3.</p> <p>8 Q. After telling you his idea that all 1536 9 bundles can be tested simultaneously in all 1536 wells of 10 his new 1536 well plate, he told you in the third 11 sentence that the readout from these millions of 12 simultaneous tests only required one high-resolution CCD 13 chip. Do you see that?</p> <p>14 MR. COSTAKOS: Objection -- objection. Form.</p> <p>15 THE WITNESS: I do see that.</p> <p>16 BY MR. SHULMAN:</p> <p>17 Q. Okay. And in the camera that you contemplated 18 using in the summer of '98, there would be one CCD chip 19 that would be used to read out each of the bundles 20 separately. Correct?</p> <p>21 A. Yes. So I want to make sure that I don't -- I 22 read this sentence that he's got one CCD chip that images</p>	<p>1 A. I do see that.</p> <p>2 MR. COSTAKOS: Objection. Form, context.</p> <p>3 BY MR. SHULMAN:</p> <p>4 Q. Okay. And PCOP is an acronym for 5 Pharmacopeia Inc. Correct?</p> <p>6 A. I believe so, yes.</p> <p>7 Q. And that's where Dr. Kirk worked at the time as 8 vice president of engineering. Right?</p> <p>9 A. I have a faint recollection that that's his 10 title, but I don't remember sitting here today that that 11 was his title.</p> <p>12 Q. Okay. And then in the fourth sentence of 13 paragraph A on page 2, he told you that "coupling to the 14 fiber bundle method seems like a big winner." Do you see 15 that?</p> <p>16 A. Yes.</p> <p>17 Q. I'm sorry?</p> <p>18 A. I do see that sentence.</p> <p>19 Q. And in the very next sentence, he explained 20 what he meant when he stated that, "for instance, a 21 low-cost fixture can be fabricated that would arrange 22 1536 fiber bundles to line up with the wells on one of</p>
<p>1 all the bundles simultaneously, and that's not what we 2 developed, but I'm just trying to, you know, read into 3 what -- that's my interpretation of those two sentences 4 He may have a different interpretation of those two 5 sentences.</p> <p>6 Q. And that's how you interpret it today?</p> <p>7 A. That's correct.</p> <p>8 Q. And you don't remember how you interpreted it 9 back in March of '98?</p> <p>10 A. I have no recollection of remembering --</p> <p>11 Q. Okay.</p> <p>12 A. -- seeing this in '98.</p> <p>13 Q. Okay. Let's look at page 2 of the email. 14 About halfway down the page, there's a paragraph labeled 15 A, the one we were looking at before, where he says, "I 16 was excited to see how small and convenient each 17 6,000-member bundle is." Do you see that?</p> <p>18 A. Yes, I do.</p> <p>19 Q. And in the third sentence of that paragraph, he 20 told you -- Dr. Kirk told you that, quote, "We have been 21 working hard on these technologies at PCOP." Do you see 22 that?</p>	<p>1 the new Costar plates." Do you see that?</p> <p>2 A. I do.</p> <p>3 Q. And he explained to you on page 3 of his email 4 that the new Costar plate was a 1536 microliter well 5 plate that Pharmacopeia had co-developed with Corning 6 Costar. Do you see that?</p> <p>7 A. I'm sorry. I'm still trying to catch up. 8 Could you show me where on page 3 --</p> <p>9 Q. Yeah.</p> <p>10 A. -- that disclosure is.</p> <p>11 Q. The first paragraph, about an inch down. 12 "PCOP is currently inviting companies to join a 13 consortium to develop a 1536-well microliter scale 14 screening system based on a plate co-developed with 15 Corning Costar."</p> <p>16 A. I see that.</p> <p>17 Q. Okay. And how is this idea of Dr. Kirk's of 18 dipping simultaneously an array of array bundles of 19 fiberoptic fibers into separate wells of a microtiter 20 plate any different than the concept you came up with or 21 claim to have come up with in the summer of '98?</p> <p>22 A. So there's -- certainly those -- they share</p>

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<p>1 those similarities of multiple fibers dipping into a 2 microtiter plate.</p> <p>3 I think what we came up with was this idea of 4 a -- of a product and how these things would be combined 5 and how they would mate to a microtiter plate.</p> <p>6 Q. Now, you mentioned earlier to me that you 7 thought 1536 was impractical. Right?</p> <p>8 A. We didn't know it at the time, but I -- here 9 today, I think it is impractical.</p> <p>10 Q. When did you learn that it was impractical?</p> <p>11 A. When we tried to make a model of 1536 and 12 having seen how that -- how difficult it is to align 13 those fibers into the wells of the microtiter plate.</p> <p>14 Q. Okay. And approximately when in point of time 15 did you discover the difficulties that you just testified 16 to?</p> <p>17 A. I think it was a continuous evolution of 18 thought from somewhere in probably the July time frame to 19 the December time frame of 1998.</p> <p>20 Q. So by the end of 1998, you knew that 1536 was 21 not going to work?</p> <p>22 A. I -- you know, I -- I just don't remember. I</p>	<p>1 A. Okay.</p> <p>2 Q. -- that Dr. Kirk disclosed in his email.</p> <p>3 According to his description, each assay well 4 is designed to hold a volume of liquid that, as he 5 described it, is measured in microliters. Correct?</p> <p>6 A. Uh-huh.</p> <p>7 Q. And according to paragraph 4 on page 1, the 8 test samples or test liquids for the assays can be 9 prepared in separate wells of the well plate until the 10 fibers are ready to be dipped into the wells. Do you see 11 that?</p> <p>12 A. I'm catching up, so I'm just -- we're flipping 13 back and forth, and I just --</p> <p>14 Q. Sure.</p> <p>15 A. -- want to read this.</p> <p>16 So you're saying paragraph 4 does -- says -- 17 discloses what?</p> <p>18 Q. Let me -- let me repeat the question.</p> <p>19 A. Okay.</p> <p>20 Q. According to paragraph 4 on page 1, the test 21 samples or test liquids for the assays can be prepared in 22 separate wells of the well plate until the fibers are</p>
<p style="text-align: center;">Page 150</p> <p>1 just remember that we came at some point to the 2 conclusion that 1536 would never be practical.</p> <p>3 Q. Was that in the decade of the '90s that that 4 decision was made or that conclusion was reached?</p> <p>5 A. I -- I think so, but I don't even know.</p> <p>6 Q. Okay. Do you know that in your patent you 7 claimed 1536 well plates?</p> <p>8 A. Yeah. Because when we filed the patent, we 9 probably still thought it was okay.</p> <p>10 Q. Do you know that you didn't file those claims 11 with 1536 well plates until well into 2004 or 2005?</p> <p>12 A. I have no idea about the patent prosecution.</p> <p>13 My guess is that it was a continuation of an earlier 14 filing.</p> <p>15 Q. Okay.</p> <p>16 A. And so the sub- -- the specification probably 17 wasn't altered, but you -- you have the documentation, so 18 if I'm wrong, please correct me.</p> <p>19 MR. SHULMAN: Okay. Five more minutes, then 20 we'll take a lunch break. Is that okay with everyone?</p> <p>21 BY MR. SHULMAN:</p> <p>22 Q. Let's talk about this 1536 well plate --</p>	<p style="text-align: center;">Page 152</p> <p>1 ready to be dipped into the wells. Correct?</p> <p>2 A. Correct.</p> <p>3 Q. And that was another --</p> <p>4 MR. COSTAKOS: And you can, of course, read any 5 part of the email that you feel appropriate to read.</p> <p>6 MR. SHULMAN: And make sure that you follow 7 counsel's instructions, particularly when they're 8 inappropriate.</p> <p>9 MR. COSTAKOS: That's not inappropriate. What 10 I'm saying is when you're flipping back and forth, he can 11 read whatever he wants to read. That's my only point.</p> <p>12 BY MR. SHULMAN:</p> <p>13 Q. Okay. And when each of the separate 1536 14 bundles are dipped into a separate one of each of the 15 1536 wells as described in Dr. Kirk's email, each of the 16 6,000 bead-containing fibers in the fiber bundles are 17 processed in parallel. Correct?</p> <p>18 MR. COSTAKOS: Objection. Form.</p> <p>19 Can you read that one back?</p> <p>20 MR. SHULMAN: Sure. I wrote it down because it 21 was a mouthful. Let me --</p> <p>22 MR. COSTAKOS: Yeah, I know. I noticed that.</p>

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1	MR. SHULMAN: Let me repeat it for you slowly	1	***
2	BY MR. SHULMAN:	2	LUNCH RECESS
3	Q. Is it correct that when each of the separate	3	***
4	1536 bundles are dipped into a separate one of the 1536	4	
5	wells as described in this email, each of the 6,000	5	(The deposition resumed at 1:50 p.m.)
6	bead-containing fibers in each bundle are processed in	6	VIDEOGRAPHER: We're on the record at 1:50 p.m.
7	parallel?	7	BY MR. SHULMAN:
8	MR. COSTAKOS: Objection. Form.	8	Q. Dr. Stuelpnagel, you mentioned earlier today
9	THE WITNESS: I'm stumbling over "processed"	9	that back in '98 it was your practice to open and read
10	because if you're saying that you can insert this in --	10	the emails that appear in your email box. Correct?
11	at least theoretically into separate wells, that's all	11	A. Yes. I -- let's just leave it at yes.
12	done in parallel. But what can't be done parallel or	12	Q. And do you have any reason that you departed
13	simultaneous is a single readout. So the readout would	13	from that practice with respect to the March 9, 1998,
14	actually be serial with each bundle being --	14	email that has been marked as Exhibit 12?
15	BY MR. SHULMAN:	15	A. No, I have no reason to assume that.
16	Q. Yeah, I'm not talking about the readout.	16	Q. Okay. Do you believe that you did read the
17	A. So I just --	17	email at the time?
18	Q. Right. So you would agree that the process	18	A. Just based upon what I normally did, I would
19	step of inserting the 6,000 fibers that are present in	19	think that I would have read the email.
20	each of the 1536 bundles into separate wells of 1536 well	20	Q. Okay. Now, can you look at Exhibit 3, please.
21	microtiter plate is done in parallel?	21	It's your deposition testimony from the earlier
22	A. Yes. Disregarding the technical limitation --	22	Illumina-Affymetrix case.
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1	technical difficulties of doing that.	1	MR. COSTAKOS: Which one are we on? Exhibit 3?
2	Q. Okay. And 6,000 fibers per bundle times 1536	2	MR. SHULMAN: Yeah.
3	bundles comes out to roughly 9 million or 10 million.	3	BY MR. SHULMAN:
4	Correct?	4	Q. And if you turn to the page that has the funny
5	A. Yeah, that sounds about right.	5	numbers in the right-hand corner that ends with 171...
6	Q. Now, let's look at the last page of the email,	6	MR. COSTAKOS: One second.
7	the second-to-last paragraph.	7	MR. SHULMAN: You get it?
8	And there Dr. Kirk told you that he would	8	MR. COSTAKOS: Uh-huh.
9	welcome the opportunity to further discuss his ideas with	9	BY MR. SHULMAN:
10	you. Correct?	10	Q. Okay. And do you see there in the bottom left
11	A. Yes, he says that.	11	quadrant, there's page 155 of the transcript?
12	Q. And did you take Dr. Kirk up on that	12	A. Yes.
13	opportunity to discuss all of these ideas with him?	13	Q. Okay. About halfway down that page, you were
14	A. I have no recollection of that.	14	asked some questions about what patents you're on. Do
15	Q. Okay. You have no recollection of ever	15	you see that?
16	discussing any of these ideas with Dr. Kirk?	16	A. Yes.
17	A. No. And until three weeks ago, I had no	17	Q. And your response, you stated, "I don't even
18	recollection of having received this email either.	18	know which ones are patents and which ones are
19	MR. SHULMAN: Why don't we take a lunch break.	19	applications, but there are some that are assay
20	VIDEOGRAPHER: Off the record at 12:59.	20	applications and patents and some that are decoding and
21	(The lunch recess was taken at 12:59 p.m.	21	some that are format-related." Do you see that?
22	Proceedings scheduled to resume at 1:50 p.m.)	22	A. Yes.

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<p>1 Q. You did give that testimony. Correct?</p> <p>2 A. Yes.</p> <p>3 Q. Okay. And then you were asked a question.</p> <p>4 " When you say format-related, do you mean -- so</p> <p>5 do you know how many issued patents there are in your</p> <p>6 name?</p> <p>7 "Answer: No.</p> <p>8 "Question: More or less than five?</p> <p>9 "Answer: Probably around that number.</p> <p>10 "Question: Around that number?</p> <p>11 "Answer: Uh-huh.</p> <p>12 "Question: Do you think about four?</p> <p>13 "Answer: Okay.</p> <p>14 "Question: I'm asking if you think that's</p> <p>15 correct.</p> <p>16 "Answer: I don't know.</p> <p>17 "Question: You have no idea?</p> <p>18 "Answer: Huh-uh.</p> <p>19 "Question: When you say format-related, what</p> <p>20 are you talking about?</p> <p>21 "Answer: Oh, for instance, their ArrayMatrix</p> <p>22 was a big part of an invention that I contributed to in a</p>	<p>1 ArrayMatrix."</p> <p>2 Did you give that testimony, sir?</p> <p>3 A. Yes, I did.</p> <p>4 Q. Okay. And is the subject matter that appears</p> <p>5 here and the answer that bridges paragraphs 156 and 157</p> <p>6 the same subject matter to which you were testifying at</p> <p>7 trial at pages 1035 through 1037?</p> <p>8 MR. COSTAKOS: Objection. Form.</p> <p>9 THE WITNESS: No. And I don't mean to split</p> <p>10 hairs, but I think I have to.</p> <p>11 BY MR. SHULMAN:</p> <p>12 Q. Okay.</p> <p>13 A. Here I'm talking about patents and the</p> <p>14 ArrayMatrix. In the testimony in court, I was talking</p> <p>15 about the specific exhibit that was shown to me.</p> <p>16 Q. Okay. Is the run that's referred to on</p> <p>17 pages 156 to 157 of your deposition, as well as the</p> <p>18 brainstorming session leading up to this 96 arrays</p> <p>19 together, is that the same run and brainstorming session</p> <p>20 to which you referred in your trial testimony at</p> <p>21 pages 1035 to 1037?</p> <p>22 A. Yes, that's true.</p>
<p style="text-align: center;">Page 158</p> <p>1 large way.</p> <p>2 "Question: You contributed in a large way to</p> <p>3 the invention of the Sentrix ArrayMatrix?</p> <p>4 "Answer: I believe so.</p> <p>5 "Question: What was your contribution to that?</p> <p>6 "Answer: Well, the invention happened in the</p> <p>7 boardroom with Tony Czarnik -- not Tony Czarnik. I'm</p> <p>8 sorry -- Mark Chee and Steve Auger and myself. And I had</p> <p>9 been running that weekend and was thinking about these</p> <p>10 probe arrays and how they're different than everybody</p> <p>11 else's arrays -- this is the fiberoptic, because that's</p> <p>12 the only format we had at the time -- and how you could</p> <p>13 actually put that into a well and bring the array to the</p> <p>14 solution as opposed to bringing the solution to the</p> <p>15 array. And so I was thinking about what are the</p> <p>16 implications of that, what can you do, and I started to</p> <p>17 think about how you could match those to wells in</p> <p>18 microtiter plates. So we started brainstorming around</p> <p>19 this, and I think it was the next day -- it might have</p> <p>20 been a couple of days later -- and we, the three of us,</p> <p>21 came up with this idea of putting 96 arrays together to</p> <p>22 match the wells in the microtiter plates, and that's the</p>	<p style="text-align: center;">Page 160</p> <p>1 Q. Okay. And so here on pages 156 and 157 -- I</p> <p>2 apologize. I don't want to mischaracterize what you just</p> <p>3 told me.</p> <p>4 A. Yeah.</p> <p>5 Q. I just forgot.</p> <p>6 A. Okay.</p> <p>7 Q. But you said your trial testimony concerned the</p> <p>8 Sentrix ArrayMatrix product. Correct?</p> <p>9 A. Yes.</p> <p>10 Q. And this testimony at pages 156 and 157</p> <p>11 concerns what, sir?</p> <p>12 A. There's elements that are talking about the</p> <p>13 patent as well as the actual product. And so there's</p> <p>14 both of those intermixed in this question and answer, as</p> <p>15 I read it.</p> <p>16 Q. Okay. In this answer that spans pages 156 and</p> <p>17 157, do you see any reference to a plate?</p> <p>18 A. No. But I use -- like I said before, the plate</p> <p>19 that I would be talking about is the Sentrix ArrayMatrix</p> <p>20 which is referred here. And so I use those terms</p> <p>21 interchangeably. I'm not quite so sure why it's</p> <p>22 important for you not to let me use those</p>

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<p>1 interchangeably, but that's how I use them.</p> <p>2 Q. I'm happy to have you do whatever you want.</p> <p>3 A. Okay.</p> <p>4 Q. I'm just asking questions, sir.</p> <p>5 A. Okay.</p> <p>6 Q. We saw, in the March 1998 email, Dr. Kirk</p> <p>7 disclosed to you this idea of creating an array of</p> <p>8 fiberoptic arrays in a bundle and dipping each of the</p> <p>9 arrays in that array of arrays into its own separate well</p> <p>10 on the microtiter plate. Do you recall that?</p> <p>11 A. Yes.</p> <p>12 MR. COSTAKOS: Objection. Form, compound.</p> <p>13 BY MR. SHULMAN:</p> <p>14 Q. Okay. Do you have any explanation for the fact</p> <p>15 that four months after Kirk disclosed that idea to you,</p> <p>16 you claimed to have thought of what you characterized</p> <p>17 earlier as substantially the same idea in the summer of</p> <p>18 '98?</p> <p>19 MR. COSTAKOS: Objection. Form.</p> <p>20 THE WITNESS: So I'm not sure that I would</p> <p>21 agree with your assessment that what we developed in the</p> <p>22 summer of 1998 is substantially the same. I think it's</p>	<p>1 A. No. I don't think I -- I have no -- I don't</p> <p>2 think there's any way I recalled the email when we had</p> <p>3 the brainstorming session or when I went for the run,</p> <p>4 because if I had, I certainly wouldn't have characterized</p> <p>5 my contribution in the way that I've characterized my</p> <p>6 contribution.</p> <p>7 Q. Or maybe you're taking credit for Dr. Kirk's --</p> <p>8 MR. COSTAKOS: Wait. Hold you. Hold on. You</p> <p>9 interrupted his answer.</p> <p>10 MR. SHULMAN: I'm just --</p> <p>11 MR. COSTAKOS: No, no, no, no. You're not</p> <p>12 allowed to interrupt.</p> <p>13 BY MR. SHULMAN:</p> <p>14 Q. Go ahead, go ahead. Finish up if you have</p> <p>15 something else to say.</p> <p>16 A. Go -- go ahead.</p> <p>17 MR. COSTAKOS: But please don't interrupt</p> <p>18 again.</p> <p>19 MR. SHULMAN: I apologize.</p> <p>20 BY MR. SHULMAN:</p> <p>21 Q. One explanation is that you forgot what you</p> <p>22 read in the email. Right?</p>
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<p>1 much more and broader than the three lines that are in</p> <p>2 Dr. Kirk's email.</p> <p>3 Second, you asked me about whether I had any</p> <p>4 explanation why I received this email and why we had a</p> <p>5 brainstorming session around this. I don't have any</p> <p>6 connection between the two whatsoever. I honestly did</p> <p>7 not remember this email until it was shown to me. I had</p> <p>8 no idea about Greg's description here of 1536 fiber</p> <p>9 bundles in a 1536 microtiter plate.</p> <p>10 BY MR. SHULMAN:</p> <p>11 Q. Okay.</p> <p>12 A. I just didn't remember those things --</p> <p>13 Q. Okay.</p> <p>14 A. -- so I don't think I used this information at</p> <p>15 all in coming up with what eventually became the</p> <p>16 ArrayMatrix. And I think that's supported with all of my</p> <p>17 previous testimony, and I think it's also supported with</p> <p>18 the enthusiasm that we felt after the brainstorming</p> <p>19 session that we thought we'd figured out what Illumina's</p> <p>20 first product's going to be.</p> <p>21 Q. And when you say you don't recall the email,</p> <p>22 you're talking about today. Correct?</p>	<p>1 A. Uh-huh. Yes.</p> <p>2 Q. Correct?</p> <p>3 Another explanation is you took credit for</p> <p>4 yourself for what was in the email. Right?</p> <p>5 A. That's your hypothesis. I have no -- I</p> <p>6 absolutely do not believe that's the case.</p> <p>7 Q. Okay. And that's your present day belief.</p> <p>8 Right?</p> <p>9 A. That's correct.</p> <p>10 Q. But you don't remember what happened back in</p> <p>11 1998 because you don't even remember receiving the email</p> <p>12 Right?</p> <p>13 MR. COSTAKOS: Objection. Form.</p> <p>14 THE WITNESS: Correct.</p> <p>15 BY MR. SHULMAN:</p> <p>16 Q. So you don't know whether you derived it from</p> <p>17 Dr. Kirk or whether you thought it of independently</p> <p>18 because you just don't remember?</p> <p>19 A. Well, I can say that if it were such an</p> <p>20 important part of us coming up with the product that we</p> <p>21 eventually came up with, I think I would remember that.</p> <p>22 So I'm sorry. I get literally hundreds of thousands of</p>

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<p>1 emails through my career at Illumina, and I don't 2 remember every one. I just don't. 3 I do remember when we developed the first 4 product at Illumina and how interesting and exciting that 5 was. And I remember, because it was such an important 6 event, how the ideas evolved to me, which included the 7 idea of -- of obsessing of the fact that these arrays are 8 different. The fact that other people had recognized 9 they were different, great, but that's not how I came up 10 with my contributions to this -- this product.</p> <p>11 Q. In fact, you thought the March 9, 1998, email 12 was a very important email, didn't you, back at that 13 time?</p> <p>14 MR. COSTAKOS: Objection. Form.</p> <p>15 THE WITNESS: I have absolutely -- I think that 16 actually mischaracterizes my testimony, and I, having the 17 fact that I don't even remember this email, wouldn't 18 characterize it as something that was important enough 19 for me to remember.</p> <p>20 BY MR. SHULMAN:</p> <p>21 Q. Okay. Isn't it true that in March and April of 22 '98, you and Kirk had further discussions about his idea</p>	<p>1 putting forward before you today to which you just 2 referred are your prior testimony. Correct?</p> <p>3 A. That's correct.</p> <p>4 Q. Okay. And that's just your say-so. Right?</p> <p>5 A. That's my say --</p> <p>6 MR. COSTAKOS: Objection. Form.</p> <p>7 THE WITNESS: It's what people have asked me 8 about historically about how this came to be.</p> <p>9 BY MR. SHULMAN:</p> <p>10 Q. Right. And all you can point is your say-so. 11 Right?</p> <p>12 MR. COSTAKOS: Objection. Form.</p> <p>13 THE WITNESS: Yes. And it's been consistent 14 over the years.</p> <p>15 ///</p> <p>16 BY MR. SHULMAN:</p> <p>17 Q. I grant you that, but that wasn't my question. 18 All you can point to is your say-so. Right?</p> <p>19 A. That's --</p> <p>20 MR. COSTAKOS: Objection. Form.</p> <p>21 THE WITNESS: I've answered that question, and 22 the answer is yes.</p>
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<p>1 set forth in the email?</p> <p>2 A. I have recollection of that, as I've testified 3 before.</p> <p>4 Q. So you're not denying it happened?</p> <p>5 A. I have no idea.</p> <p>6 Q. Okay. And you don't recall having taken Kirk's 7 ideas and claimed it as your own?</p> <p>8 A. That's right.</p> <p>9 Q. Okay. You're not saying it didn't happen?</p> <p>10 A. No. I think if that had happened, I would have 11 a different recollection of how the ArrayMatrix came to 12 be. And so all the consistent testimonies, all the times 13 that I've remembered how this invention came to be did 14 not include thinking about this email that Greg had sent 15 me.</p> <p>16 Q. What can you point to other than your say-so 17 that Kirk's email had no influence on what you claimed to 18 have been your conception in the summer of '98?</p> <p>19 A. Again, all I can point is the documents that 20 you're putting in front of me that I think are consistent 21 with my explanation today, and that's it.</p> <p>22 Q. Now, let me show you -- the documents that I'm</p>	<p>1 BY MR. SHULMAN:</p> <p>2 Q. Okay. Can you point to any other evidence to 3 demonstrate that you didn't derive the invention from the 4 explication that Dr. Kirk provided in his email, 5 Exhibit 12?</p> <p>6 A. No, I cannot.</p> <p>7 MR. SHULMAN: Okay. Let me mark as Exhibit 13 8 another email from Dr. Kirk to Dr. Walt dated March 11, 9 1998, bearing production Nos. AFMX 1808315 through 1808316. 10 (Exhibit 13 was marked.)</p> <p>11 BY MR. SHULMAN:</p> <p>12 Q. If you'd look first at the first page of this 13 email, I have no reason to believe you've seen this 14 before, so I'm not going to suggest that you have.</p> <p>15 A. Okay.</p> <p>16 Q. But I'd like you to just read the first page.</p> <p>17 A. Okay.</p> <p>18 Q. And you see the first page. It's an email from 19 Dr. Kirk to Dr. Walt from March 11 of '98?</p> <p>20 A. I see that.</p> <p>21 Q. And do you see that the attachment is "Feedback 22 from Thursday meeting at Tufts"?</p>

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<p>1 A. The subject is titled that, yes.</p> <p>2 Q. And then the feedback is actually attached</p> <p>3 there as a little icon?</p> <p>4 A. Yes.</p> <p>5 Q. And then that attachment is included as part of</p> <p>6 this exhibit. Correct?</p> <p>7 A. Appears to be, yes.</p> <p>8 Q. Okay. And in the email that Kirk wrote to</p> <p>9 Walt, he stated that, quote, "I was so excited after the</p> <p>10 visit to your lab and our discussion that I sent Larry</p> <p>11 and John a, quote, stream of consciousness, unquote,</p> <p>12 email with some ideas and business strategy thoughts.</p> <p>13 They suggested I send them on to you. Some are probably</p> <p>14 not worth much discussion. Let me know your thoughts."</p> <p>15 Do you see that?</p> <p>16 A. I do.</p> <p>17 Q. And you're the Larry and John -- you're the</p> <p>18 "John," and Larry Bock is the Larry in this email.</p> <p>19 Correct?</p> <p>20 A. I'm assuming so.</p> <p>21 Q. Okay. Why did you suggest to Dr. Kirk that he</p> <p>22 send his March 9 email to Dr. Walt?</p>	<p>1 you should ask me the question again because I got lost.</p> <p>2 ///</p> <p>3 BY MR. SHULMAN:</p> <p>4 Q. You don't deny having made the suggestion to</p> <p>5 Dr. Kirk, but you don't recall why you did so. Is that</p> <p>6 fair?</p> <p>7 A. I -</p> <p>8 MR. COSTAKOS: Objection. Form.</p> <p>9 THE WITNESS: I have no recollection of whether</p> <p>10 I made the suggestion that he send this to David Walt,</p> <p>11 nor any idea why or what my purpose was for suggesting</p> <p>12 that, if, in fact, I did.</p> <p>13 The only thing that I can piece together is the</p> <p>14 emails that you sent. And certainly one could infer from</p> <p>15 those emails that I might have said that. Could have</p> <p>16 been Larry said it, to send it to Dr. Walt. I have no</p> <p>17 idea. I have no remembrance of that.</p> <p>18 BY MR. SHULMAN:</p> <p>19 Q. Okay. Do you have any reason to doubt that you</p> <p>20 made this suggestion to Dr. Kirk that he send his March 9</p> <p>21 email to Dr. Walt?</p> <p>22 MR. COSTAKOS: Objection. Form, calls for</p>
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<p>1 A. Well, from today's discussion, I think you sent</p> <p>2 me an email from -- you showed me an email from Greg</p> <p>3 where, in the body of the email, he asked whether he</p> <p>4 should forward those to David Walt.</p> <p>5 I'm assuming I responded to that email and said</p> <p>6 sure, but I have no recollection of doing that. I'm just</p> <p>7 trying to piece together the -- the documents that you've</p> <p>8 put forth before me today.</p> <p>9 Q. Okay. Well, I don't want you to speculate.</p> <p>10 I'm asking you, why did you suggest to Dr. Kirk that he</p> <p>11 sent -- that he send, rather, his March 9, 1998, email to</p> <p>12 Dr. Walt?</p> <p>13 A. Well, since I have no recollection of sending</p> <p>14 that email that actually told him to do that, I have</p> <p>15 absolutely no recollection of knowing why I would say</p> <p>16 that.</p> <p>17 Q. Okay.</p> <p>18 A. I think both of those are compatible.</p> <p>19 Q. So you don't -- you don't deny having done so;</p> <p>20 you just don't remember why you did it?</p> <p>21 MR. COSTAKOS: Objection. Form.</p> <p>22 THE WITNESS: Well, I -- I -- I don't. Maybe</p>	<p>1 speculation.</p> <p>2 THE WITNESS: I have no reason to doubt it, and</p> <p>3 I think it's a reasonable inference based upon the</p> <p>4 documents you've put in front of me.</p> <p>5 ///</p> <p>6 BY MR. SHULMAN:</p> <p>7 Q. Okay. And would you have made that suggestion</p> <p>8 without first reading Dr. Kirk's March 9 email?</p> <p>9 A. I've -- as I've testified before, I'm assuming</p> <p>10 I did read the email, but I have no remembrance of</p> <p>11 reading the email.</p> <p>12 Q. Are you able to testify on your oath that in</p> <p>13 the time frame from March through July of 1998 you</p> <p>14 completely forgot about the March 9, 1998, email?</p> <p>15 A. I have no recollection of the March 1998 email</p> <p>16 and no understanding how I would have remembered it</p> <p>17 between March and June. It's, to the best of my</p> <p>18 recollection, under oath that I did not use that in the</p> <p>19 brainstorming sessions that we had later in June or July.</p> <p>20 Q. That wasn't my question, sir.</p> <p>21 I asked you, can you testify on your oath</p> <p>22 positively that after receiving the email on March 9 and</p>

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<p>1 before the brainstorming session in the summer of '98 you 2 completely forgot about everything that was in Kirk's 3 email?</p> <p>4 MR. COSTAKOS: Objection. Asked and answered, 5 form.</p> <p>6 THE WITNESS: I'm trying -- trying to 7 understand how I didn't answer that before because I 8 think I did.</p> <p>9 I don't think I remember that email between 10 March and June, because, otherwise, I would have had a 11 different recollection of how the ArrayMatrix product 12 came to be.</p> <p>13 BY MR. SHULMAN:</p> <p>14 Q. That assumes that the recollection set forth in 15 your prior testimony is truthful. Right?</p> <p>16 A. I appreciate your interest in trying to degrade 17 me and make me feel -- or make -- give the impression 18 that I'm not trying to be truthful in all of my 19 testimonies.</p> <p>20 I can tell you here today that I've been 21 truthful to the best of my ability in every damn 22 testimony I've ever given, including this one, sir.</p>	<p>1 Q. And you wrote to him, "David was impressed with 2 your email." Do you see that?</p> <p>3 A. Yes.</p> <p>4 Q. How did you know that Dr. Walt was impressed 5 with Dr. Greg's -- I'm sorry -- Dr. Kirk's March 9, 1998, 6 email?</p> <p>7 A. I don't remember. I'm inferring from this 8 email that David and I talked about the email.</p> <p>9 Q. Okay. What did you talk to Dr. Walt about 10 concerning Dr. Kirk's March 9 email?</p> <p>11 A. Since I don't even remember having that 12 conversation, I'm only inferring from this email. I have 13 no idea --</p> <p>14 Q. Okay.</p> <p>15 A. -- what the context or subject of that email 16 was or that discussion with David was.</p> <p>17 Q. And you went on to say in Exhibit 14 that "we 18 both appreciated your enthusiasm." Do you see that?</p> <p>19 A. I do.</p> <p>20 Q. And the "we" there is Dr. Walt and yourself. 21 Correct?</p> <p>22 A. Yes.</p>
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<p>1 Q. Okay. Now, after Dr. Kirk sent his March 1998 2 email to Dr. Walt, you again communicated with Dr. Kirk 3 about his email and told him that Dr. Walt was very 4 impressed with him. Correct?</p> <p>5 A. I have no -- did -- was that one of the 6 documents that we've seen? Because I -- I don't -- I 7 don't actually remember that either.</p> <p>8 MR. SHULMAN: Okay. Well, let's see if we can 9 jog a memory here.</p> <p>10 Could we mark, please, as Exhibit 14 a one-page 11 document bearing production Nos. AFMX 1808319, which is 12 an email from Dr. Stuelpnagel to Dr. Kirk dated Thursday, 13 March 19, 1998.</p> <p>14 (Exhibit 14 was marked.)</p> <p>15 BY MR. SHULMAN:</p> <p>16 Q. Have you had a chance to review the email?</p> <p>17 A. I've read it, yes.</p> <p>18 Q. Okay. And is this an email that you wrote to 19 Dr. Kirk on or about March 19, 1998?</p> <p>20 A. It appears so.</p> <p>21 MR. COSTAKOS: Objection. Foundation.</p> <p>22 BY MR. SHULMAN:</p>	<p>1 Q. Okay. And how would you know that Dr. Kirk was 2 enthusiastic if you hadn't read his email?</p> <p>3 A. I'm assuming I did read the email.</p> <p>4 Q. And then you forgot about it?</p> <p>5 A. Obviously.</p> <p>6 Q. Who's Wally?</p> <p>7 A. Wally is Wally Parse, the person who worked 8 with Greg at Molecular Devices. We talked about that 9 earlier in the day.</p> <p>10 Q. Okay. Now, Dr. Walt is the so-called father of 11 the Walt technology. Correct?</p> <p>12 A. Yes. He and others. I think there's other 13 people on the patent.</p> <p>14 Q. Would it be fair to say that in March of 1998, 15 Dr. Walt was one of the people who knew more about the 16 Walt technology than anybody else in the world?</p> <p>17 MR. COSTAKOS: Objection. Form.</p> <p>18 THE WITNESS: He was -- sure. Sure. He was 19 one of the people. I think everybody in his lab would 20 qualify, too.</p> <p>21 BY MR. SHULMAN:</p> <p>22 Q. Okay. And according to you, Dr. Walt was</p>

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<p>1 impressed by Dr. Kirk's email where Kirk described his 2 own ideas about that technology. Correct?</p> <p>3 MR. COSTAKOS: Objection. Form.</p> <p>4 THE WITNESS: It appears so, yes.</p> <p>5 BY MR. SHULMAN:</p> <p>6 Q. What was it about Kirk's email that was 7 impressive to Dr. Walt?</p> <p>8 MR. COSTAKOS: Objection. Asked and answered. 9 foundation.</p> <p>10 THE WITNESS: Since I have no recollection of 11 the conversation that David and I might have had with 12 respect to Greg's email, I have no idea what he might 13 have been impressed with. I have no recollection of what 14 he might have been impressed with.</p> <p>15 BY MR. SHULMAN:</p> <p>16 Q. Have you ever heard of a man by the name of 17 Rhett, R-h-e-t-t, Affleck, A-double-f-l-e-c-k?</p> <p>18 A. I have a vague memory that he was a colleague 19 of Greg Kirk's, and those were the two people that were 20 thinking about joining Illumina.</p> <p>21 Q. Did you ever meet with Mr. Affleck?</p> <p>22 A. I might have. It's really hard for me to</p>	<p>1 MR. COSTAKOS: It's this. 2 MR. SHULMAN: It's the deposition. 3 I apologize. 4 Now, let me mark for identification as 5 Exhibit 15 a copy of the 020 patent-in-suit. 6 (Exhibit 15 was marked.)</p> <p>7 BY MR. SHULMAN:</p> <p>8 Q. If you would turn, please, to the claims. And 9 if you'd also place before you the March 9, 1998, email, 10 Exhibit 12.</p> <p>11 Could you read Claim 1 to yourself, please. 12 Do you understand Claim 1?</p> <p>13 A. I believe I do, although I'm not here to 14 represent the legal definition of a claim because I 15 understand that that's developed during prosecution, and 16 I don't want to --</p> <p>17 Q. I'm not going to ask you for definitions. 18 A. Okay, okay.</p> <p>19 Q. So Element A is "a first substrate with a 20 surface comprising a plurality of assay wells comprising 21 samples." Do you see that?</p> <p>22 A. I do.</p>
<p style="text-align: center;">Page 178</p> <p>1 remember all of the things that happened. I sort of 2 faintly remember that Greg turned us down for the job. 3 Did we meet with Rhett? I can't remember. 4 Q. So we've seen several emails now that refer 5 to -- or at least state that you suggested to Kirk that 6 he send his March 9 email to Walt and that Walt was 7 impressed with the March 9 email and both of you 8 appreciated Kirk's enthusiasm. 9 Do these emails that we've now looked at, 10 Exhibits 12, 13, and 14, refresh your recollection at all 11 about discussions that you had with Kirk about any of the 12 ideas set forth in his email?</p> <p>13 A. No, they don't. 14 Q. Now, didn't Dr. Kirk remind you in May of '98 15 that he had worked with Rhett Affleck in coming up with 16 some of the ideas in his March 9 email?</p> <p>17 A. I don't recall. 18 Q. Let's look at that. I believe we've already 19 marked it. 20 Look at Exhibit 11, please -- strike that. 21 We have marked it. That's the wrong exhibit. 22 Do you have Exhibit 3?</p>	<p style="text-align: center;">Page 180</p> <p>1 Q. Okay. And do you understand that that would 2 cover a microtiter plate?</p> <p>3 MR. COSTAKOS: I'm going to object to the form 4 of the question to the extent it calls for a legal 5 conclusion and also competence and foundation.</p> <p>6 THE WITNESS: I could see where that would 7 cover microtiter plate.</p> <p>8 BY MR. SHULMAN:</p> <p>9 Q. Okay. Including a 1536-well microtiter plate. 10 Right?</p> <p>11 MR. COSTAKOS: Same objections. 12 THE WITNESS: Yes. I don't see any difference.</p> <p>13 BY MR. SHULMAN:</p> <p>14 Q. Then paragraph (b) begins by calling for "a 15 second substrate comprising a plurality of projections, 16 each projection comprising an array location." 17 I'm just going to break it down into pieces 18 because there's so many words there.</p> <p>19 A. Okay. 20 Q. Okay? 21 Would you agree that a fixture that has 1536 22 different fiberoptic bundles would be a substrate</p>

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<p>1 comprising a plurality of projections, each projection 2 comprising an array location?</p> <p>3 MR. COSTAKOS: Same objection. Legal 4 conclusion, competence, foundation, form.</p> <p>5 THE WITNESS: And I'm not prepared today to say 6 that those things are similar enough. You know, a 7 substrate versus his description of a fixture or 8 fixtures, I have no idea what Greg meant by that.</p> <p>9 I do have an idea of what we meant by a second 10 substrate, and I think it's adequately described in the 11 patent application.</p> <p>12 BY MR. SHULMAN:</p> <p>13 Q. Let me begin by asking you, what did you -- 14 what's your idea of what you meant by a second substrate?</p> <p>15 A. The plate. The plate that holds the arrays.</p> <p>16 Q. Okay.</p> <p>17 A. A monolithic block that has the arrays in it as 18 projections.</p> <p>19 Q. Okay. If a second substrate simply means a 20 support -- just means a support, let's assume that -- 21 then would you agree that a fixture that has 1536 bundles 22 of fiberoptic arrays would be a second substrate</p>	<p>1 BY MR. SHULMAN: 2 Q. Yes, to you.</p> <p>3 A. To me, the key difference -- or what I think is 4 the difference is the second substrate. It's not clear 5 that Kirk had identified a substrate as -- as we have 6 described it in this application based upon this email 7 that you've been reviewing with me today.</p> <p>8 Q. Anything else, sir?</p> <p>9 A. No.</p> <p>10 Q. Okay. And the difference in terms of the 11 substrate is the substrate you guys contemplated was this 12 plate that you've referred to. Correct?</p> <p>13 A. Yeah. The monolithic block-type thing with the 14 array projections firmly adhered or attached or developed 15 from.</p> <p>16 Q. Okay. And all Kirk says is have a fixture with 17 bundles of fibers sticking out of it?</p> <p>18 A. That's right.</p> <p>19 Q. Okay. He doesn't tell you more about what that 20 fixture is?</p> <p>21 A. That's right.</p> <p>22 Q. Okay. Anything else?</p>
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<p>1 comprising a plurality of projections, each protection 2 comprising an array location?</p> <p>3 MR. COSTAKOS: Same objections. Legal 4 conclusion, competence, foundation, form.</p> <p>5 THE WITNESS: I am not prepared to answer a 6 question that's based on an assumption, so unless --</p> <p>7 BY MR. SHULMAN:</p> <p>8 Q. Okay.</p> <p>9 A. -- you know better -- unless you have a way of 10 describing what was meant in the email, I'm not prepared 11 to assume I know it. And I'm not prepared to assume 12 what, through prosecution, the definition of the second 13 substrate has evolved to.</p> <p>14 Q. That's very well.</p> <p>15 Can you tell me in your own mind what the 16 differences are between the idea that Kirk disclosed in 17 his email of taking an array of 1536 fiber bundle arrays 18 and dipping them simultaneously into individual wells of 19 a microtiter plate and that which is set forth in Claim 1 20 of the 020?</p> <p>21 A. To me --</p> <p>22 MR. COSTAKOS: Same objections.</p>	<p>1 MR. COSTAKOS: Same objections.</p> <p>2 THE WITNESS: I was back reading the claim. 3 I'm not quite sure what the question on record is, but I 4 don't think I have any other things to add about my 5 understanding of Claim 1, which should not be construed 6 as a legal understanding.</p> <p>7 BY MR. SHULMAN:</p> <p>8 Q. Okay. Now, during prosecution of the 9 applications for the 841 and the 020 patents, which are 10 the two patents-in-suit here, did you ever tell the 11 examiner that in the summer of '98 you arrived at the 12 idea of simultaneously inserting an array of fiberoptic 13 arrays into individual wells of a well plate?</p> <p>14 A. Did I tell the examiner that?</p> <p>15 Q. Correct.</p> <p>16 A. I don't remember telling the examiner that.</p> <p>17 Q. Why not? Not why don't you remember, but why 18 didn't you tell him that?</p> <p>19 A. Well, first, I don't remember --</p> <p>20 MR. COSTAKOS: Objection. Form.</p> <p>21 THE WITNESS: -- which is slightly different 22 than your question, which is why I didn't tell him that</p>

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<p>1 because I don't remember. I may or may not have. 2 Second is I'm not sure it would be relevant to 3 the examiner, and I'd leave that up to the legal team 4 that's prosecuting the patents to decide whether that 5 information should be administered -- or delivered 6 during -- during patent prosecution.</p> <p>7 BY MR. SHULMAN:</p> <p>8 Q. Did you ever communicate with the examiner at 9 all concerning the applications that led to your 841 and 10 020 patents? You personally, not through a 11 representative.</p> <p>12 A. I'm trying to remember because there have been 13 times when I have communicated with the patent office 14 either by participating in a telephone call or an 15 examiner visit or -- or through a declaration, but I 16 don't have any specific recollection of interacting with 17 an examiner on these two patents.</p> <p>18 Q. Okay. During prosecution of the applications 19 for the 841 and the 020, did you ever consider telling 20 the examiner that in the summer of '98 you arrived at the 21 idea of simultaneously inserting an array of fiberoptic 22 arrays into individual wells of a well plate?</p>	<p>1 patents-in-suit? 2 A. I believe that the patent family, of course, 3 was -- with the original application was written by Robin 4 Silva.</p> <p>5 I know that internal Illumina legal team worked 6 with -- I don't -- I don't know if they worked with 7 outside counsel or not, but to answer your question, I 8 believe John Murphy was involved in the prosecution of 9 these patents, these two patents that you've drawn to my 10 attention.</p> <p>11 Q. And he was an internal Illumina guy. Right? 12 A. Yes.</p> <p>13 Q. Okay. Without getting into the substance, but 14 I'd like to know with whom on the legal team you 15 interacted in connection with preparing and prosecuting 16 the applications that led to the 841 and the 020.</p> <p>17 A. So may I provide a little background? 18 Q. However you need to answer it. 19 A. So from 1998 to the time the current general 20 counsel arrived at Illumina, I supervised the legal 21 department at Illumina.</p> <p>22 During some of that period of time, Nicky</p>
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<p>1 MR. COSTAKOS: Objection. Form. 2 THE WITNESS: Again, I don't have any 3 recollection that I've communicated with the examiner 4 directly other than the patent application.</p> <p>5 BY MR. SHULMAN:</p> <p>6 Q. My question was, during the prosecution of the 7 applications for the two patents-in-suit, did you ever 8 consider telling the examiner that in the summer of '98 9 you arrived at this idea of simultaneously inserting an 10 array of fiberoptic arrays into individual wells of a 11 well plate?</p> <p>12 A. I don't think I participated at all -- well, I 13 shouldn't say that.</p> <p>14 I don't recollect participating directly with 15 the examiner on the patent prosecution for these two 16 patents, and so I don't think I would have considered 17 providing additional information unless it was requested 18 by those that were communicating directly with the patent 19 office.</p> <p>20 Q. Okay. Which attorney or attorneys or patent 21 agents do you associate with having handled your patent 22 applications that led to the issuance of the two</p>	<p>1 Espinosa, who is a patent attorney, reported to me and 2 directly supervised the legal team. 3 I believe she left and there was an 18-month or 4 maybe even a two-year gap in which I, once again, assume 5 direct reporting relationships with all of the legal team 6 at Illumina. So everybody that was on the legal -- it 7 was quite small. But everybody that was on the legal 8 team for a while reported back directly to me until we 9 hired Chris Cabou.</p> <p>10 I believe that the prosecution of these two 11 patents overlapped that period of time in which I was in 12 charge of the legal team. And I believe that I 13 interfaced with John Murphy in at least the beginning of 14 the patent prosecution around this, but the details of 15 the prosecution were not something that I was involved 16 with after Chris came in and certainly not even while 17 John was prosecuting.</p> <p>18 Q. Who's Chris? 19 A. Chris Cabou. I'm sorry. The general counsel 20 at Illumina.</p> <p>21 Q. Okay. Let me see if I can summarize. 22 A. Okay.</p>

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<p>1 Q. You've given me a lot of information there. 2 The original application for these patents was 3 prepared by Robin Silva? 4 A. Correct. 5 Q. And you dealt with her? 6 A. Yes. 7 Q. Okay. 8 A. And I was the person interfacing directly with 9 her because the intellectual property fell to my 10 responsibilities during that time period. 11 Q. Okay. And the original application, I believe, 12 was filed in December of '98? 13 A. Okay. 14 Q. For how long did Robin Silva remain involved in 15 the applications that led to the patents-in-suit? 16 A. Quite a few years. We started to divide up our 17 portfolio after Nicky Espinosa joined Illumina. And she 18 allocated certain applications to different outside 19 firms. 20 To the best of my knowledge, Robin Silva 21 maintained prosecution over the -- what we call the Tufts 22 portfolio or those that have David Walt as investor --</p>	<p>1 were, I think, filed after Nicky left. The continuation. 2 So I think Nicky transitioned out of Illumina, 3 I'm going to guess, 2006, maybe 2007. I don't have a 4 clear recollection. And then we hired Chris, I think, in 5 2008. 6 Q. My question was, did you have any interactions 7 with Nicky Espinosa about prosecuting any of the 8 applications that led to the patents-in-suit? 9 A. And I'm sorry if, again, I'm being 10 argumentative, but I don't know exactly when the 11 patents-in-suit were filed, but I think -- 12 Q. Nine -- 13 A. -- it was the gap period from when Nicky left 14 and before Chris came. And so the answer is, for the 15 patents-in-suit, I do not believe I interfaced with 16 Nicky, but I'm not positive because I don't know when the 17 patent-in-suit was filed. I can take a moment -- 18 Q. Let me explain. 19 A. Yes. 20 Q. There were a series of applications -- 21 A. Yes. 22 Q. -- the first of which was filed in '98.</p>
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<p>1 inventor and Tufts as assignee. 2 I believe the internal Illumina general 3 applications were transferred to other outside firms, but 4 I don't have a specific recollection of when that 5 occurred and who the firms would have been. 6 Q. Okay. Let me ask it specifically. 7 Robin Silva was one lawyer with whom you 8 interfaced on the applications that led to the 9 patents-in-suit. Correct? 10 A. Yes. 11 Q. John Murphy was another? 12 A. Yes. But to clarify, John Murphy's a 13 paralegal, not a patent attorney. 14 Q. And I believe he's a patent agent. Correct? 15 A. I believe so. 16 Q. Okay. 17 A. In fact, I know so. 18 Q. Nicky Espinosa -- did you interface with her 19 over the prosecution of the patent -- of the applications 20 for the patents-in-suit? 21 A. These -- I interfaced with her during her 22 tenure at Illumina. I believe that these patents-in-suit</p>	<p>1 All of my questions have been with respect to 2 any of the applications leading to the patents-in-suit, 3 so -- 4 A. Okay. 5 Q. -- let me back up and start over. 6 A. I'm sorry. I misunderstood. 7 Q. Is it correct that beginning with the 1998 8 application, you had dealings with Miss Silva concerning 9 the prosecution of one or more of the applications that 10 led to the patents-in-suit? 11 A. Yes. 12 Q. And the same is true with Mr. Murphy? 13 A. Yes. 14 Q. Is the same also true with Nicky Espinosa? 15 A. Yes. 16 Q. Were there any other attorneys or patent agents 17 with whom you dealt concerning the applications or any of 18 the applications that led to the patents-in-suit? 19 A. Not that I can recollect, because I think any 20 external counsel, besides Robin, would have interfaced 21 directly either with John Murphy or Nicky Espinosa. 22 Q. Have you ever heard of a man by the name of</p>

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<p>1 Hefner? I don't know his first name.</p> <p>2 A. I have heard of that name.</p> <p>3 Q. He's an attorney at Knobbe Martens, I believe?</p> <p>4 A. Sounds reasonable. I know we have used them</p> <p>5 for prosecution.</p> <p>6 Q. Have you -- did you have any dealings with</p> <p>7 Mr. Hefner concerning any of the applications that led to</p> <p>8 the patents-in-suit?</p> <p>9 A. I don't believe I did.</p> <p>10 Q. Okay.</p> <p>11 A. I think I had some communications around the</p> <p>12 decoding family, but I don't think we had anything around</p> <p>13 the ArrayMatrix family.</p> <p>14 Q. During the preparation or prosecution of any of</p> <p>15 the applications for the 841 and 020 patents, did you</p> <p>16 ever discuss with either Mr. Chee or Mr. Auger whether</p> <p>17 you should tell the examiner that in the summer of 1998</p> <p>18 you arrived at the idea of simultaneously inserting an</p> <p>19 array of fiberoptic arrays into individual wells of a</p> <p>20 well plate?</p> <p>21 MR. COSTAKOS: Objection. Form. It's asked</p> <p>22 and answered.</p>	<p>1 THE WITNESS: No.</p> <p>2 BY MR. SHULMAN:</p> <p>3 Q. Why not?</p> <p>4 A. Because I didn't even remember the email.</p> <p>5 Q. During prosecution of the applications for the</p> <p>6 841 and 020 patents, did you ever consider telling the</p> <p>7 examiner that in March 1998 Dr. Kirk disclosed to you his</p> <p>8 idea of simultaneously inserting an array of fiberoptic</p> <p>9 arrays into individual assay wells of a well plate?</p> <p>10 MR. COSTAKOS: Objection. Form.</p> <p>11 THE WITNESS: No.</p> <p>12 BY MR. SHULMAN:</p> <p>13 Q. During preparation or prosecution of the</p> <p>14 applications for the 841 and 020 patents, did you ever</p> <p>15 disclose to or discuss with either Mr. Auger or Dr. Chee</p> <p>16 that in March of '98 Dr. Kirk had disclosed to you his</p> <p>17 idea of simultaneously inserting an array of fiberoptic</p> <p>18 arrays into individual wells of a well plate?</p> <p>19 MR. COSTAKOS: Objection. Form.</p> <p>20 THE WITNESS: No. Again, because I didn't</p> <p>21 remember the email.</p> <p>22 BY MR. SHULMAN:</p>
<p>1 THE WITNESS: No. Again, I don't think I had</p> <p>2 any contemplation of ever telling the examiner anything,</p> <p>3 and so I have no recollection of telling Mark or Steve</p> <p>4 that, too.</p> <p>5 BY MR. SHULMAN:</p> <p>6 Q. Okay. During preparation or prosecution of the</p> <p>7 applications for the 841 and 020 patents, did you ever</p> <p>8 discuss with any of the attorneys responsible for those</p> <p>9 applications whether you should tell the examiner that in</p> <p>10 the summer of 1998 you arrived at the idea of</p> <p>11 simultaneously inserting an array of fiberoptic arrays</p> <p>12 into individual wells of the well plate?</p> <p>13 MR. COSTAKOS: Objection. Form.</p> <p>14 THE WITNESS: No. And I think it's -- no.</p> <p>15 BY MR. SHULMAN:</p> <p>16 Q. Okay. During prosecution of the applications</p> <p>17 for the 841 and 020 or any of those applications, did you</p> <p>18 ever tell the examiner that in March of 1998 Dr. Kirk</p> <p>19 disclosed to you his idea of simultaneously inserting an</p> <p>20 array of fiberoptic arrays into individual assay wells of</p> <p>21 a microtiter well plate?</p> <p>22 MR. COSTAKOS: Objection. Form.</p>	<p>1 Q. During preparation and prosecution of the</p> <p>2 applications for the patents-in-suit, did you ever</p> <p>3 disclose to or discuss with any of the attorneys</p> <p>4 responsible for those applications that in March of '98</p> <p>5 Dr. Kirk had disclosed to you his idea of simultaneously</p> <p>6 inserting an array of fiberoptic arrays into individual</p> <p>7 wells of a well plate?</p> <p>8 A. No.</p> <p>9 Q. During prosecution of the applications for the</p> <p>10 841 and 020 patents, did you ever disclose to the</p> <p>11 examiner Dr. Kirk's March 1998 email?</p> <p>12 A. No.</p> <p>13 Q. Or its content?</p> <p>14 A. No.</p> <p>15 Q. During prosecution of the applications for the</p> <p>16 841 and 020 patents, did you ever consider disclosing to</p> <p>17 the examiner Dr. Kirk's March 1998 email or its contents?</p> <p>18 MR. COSTAKOS: Objection. Form.</p> <p>19 THE WITNESS: No.</p> <p>20 BY MR. SHULMAN:</p> <p>21 Q. During prosecution of the applications for the</p> <p>22 841 and 020, did you ever discuss or disclose to either</p>

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<p>1 of your co-inventors Dr. Kirk's March 1998 email or its 2 content?</p> <p>3 A. No.</p> <p>4 MR. COSTAKOS: Objection. Form.</p> <p>5 //</p> <p>6 BY MR. SHULMAN:</p> <p>7 Q. You're sure about that?</p> <p>8 A. Yes.</p> <p>9 Q. During preparation or prosecution of the 10 applications for the 841 and 020 patents, did you ever 11 discuss or disclose to either of your co-inventors 12 Dr. Kirk's March 1998 email or its content?</p> <p>13 A. I don't believe so.</p> <p>14 Q. And you're sure about that?</p> <p>15 A. As best I can recollect.</p> <p>16 Q. During preparation or prosecution of the 17 applications for the 841 and 020 patents, did you ever 18 discuss or disclose to any of the attorneys responsible 19 for those applications Dr. Kirk's March 1998 email or its 20 content?</p> <p>21 MR. COSTAKOS: Objection. Form.</p> <p>22 THE WITNESS: No.</p>	<p>1 surmising you didn't know about it because of your 2 invention story to which you've testified?</p> <p>3 A. Yes.</p> <p>4 MR. COSTAKOS: Objection. Form.</p> <p>5 BY MR. SHULMAN:</p> <p>6 Q. Now, back in 2007, as we saw earlier, there was 7 a lawsuit pending between Affymetrix and Illumina. 8 Correct?</p> <p>9 A. Correct.</p> <p>10 Q. And during the trial of that case, you gave the 11 sworn testimony that we looked at earlier. Correct?</p> <p>12 A. Correct.</p> <p>13 Q. And at the time that you gave that testimony, 14 you were the chief operating officer of Illumina. 15 Correct?</p> <p>16 A. Correct.</p> <p>17 Q. And in 2007 when you gave that testimony, 18 there's no doubt that you had read Dr. Kirk's March 1998 19 email where he disclosed to you his idea of 20 simultaneously inserting an array of fiberoptic arrays 21 into individual wells of a well plate?</p> <p>22 MR. COSTAKOS: Objection. Form.</p>
<p style="text-align: center;">Page 198</p> <p>1 BY MR. SHULMAN:</p> <p>2 Q. Once again, that's because --</p> <p>3 A. I didn't remember the email.</p> <p>4 Q. -- you don't remember -- you don't remember it 5 today?</p> <p>6 A. And as I've testified, I didn't remember it when we made the invention and -- I didn't remember it.</p> <p>7 Q. Is it your testimony that today you remember 8 not remembering it in '98?</p> <p>9 A. No. It was my testimony that it was inconsistent with how I felt about the activities around the brainstorming session and how we reached those activities to suggest that I didn't remember it then either.</p> <p>10 Q. Okay. But I'm asking you, is it your memory 11 today that you can recall not having any recollection of 12 the email back in 1998?</p> <p>13 A. No.</p> <p>14 MR. COSTAKOS: Objection. Form.</p> <p>15 THE WITNESS: That would be impossible.</p> <p>16 BY MR. SHULMAN:</p> <p>17 Q. Okay. So what you're saying is you're</p>	<p style="text-align: center;">Page 200</p> <p>1 BY MR. SHULMAN:</p> <p>2 Q. Correct?</p> <p>3 MR. COSTAKOS: Foundation.</p> <p>4 THE WITNESS: At the time that I testified at 5 the Affymetrix trial, I had no recollection of the Kirk 6 email.</p> <p>7 BY MR. SHULMAN:</p> <p>8 Q. But there's no doubt that you had read it as of 9 that time. Correct?</p> <p>10 MR. COSTAKOS: Same objections.</p> <p>11 THE WITNESS: I have -- "no doubt" is your 12 words. I have inferred from a series of emails that 13 the -- is a strong suggestion that I did read the email.</p> <p>14 MR. SHULMAN: I ask you one more time.</p> <p>15 BY MR. SHULMAN:</p> <p>16 Q. Is there any doubt that you had read it?</p> <p>17 MR. COSTAKOS: Same objections.</p> <p>18 THE WITNESS: Any doubt that I had read it 19 Other than the fact that I can't remember, no.</p> <p>20 BY MR. SHULMAN:</p> <p>21 Q. Okay. Well, let's see if, in fact, you had 22 read it.</p>

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<p>1 Prior to today, you've had some experience with 2 inventorship issues on patents that named you as an 3 inventor. Correct?</p> <p>4 A. Correct.</p> <p>5 Q. For example, in 2005, about five years ago, 6 Mr. Czarnik, a former employee of Illumina, brought suit 7 against Illumina. Correct?</p> <p>8 A. Correct.</p> <p>9 Q. And in that lawsuit, Mr. Czarnik claimed that 10 he should have been named as an inventor on several 11 Illumina patents where you had been named as the 12 inventor. Correct?</p> <p>13 A. On -- there were two patent families. One 14 patent family I was a -- one of the named inventors. On 15 the other patent family, I was not.</p> <p>16 Q. Okay. But there were certainly patents naming 17 you as an inventor where he claimed that you wrongfully 18 excluded him as an inventor. Correct?</p> <p>19 MR. COSTAKOS: Objection. Form.</p> <p>20 THE WITNESS: I don't know about the plural 21 "patents" at the time of the lawsuit. I don't know 22 whether there was two issued patents out of this patent</p>	<p>1 MR. COSTAKOS: Objection. Form. Sorry. 2 THE WITNESS: Yes. With the caveat that I just 3 don't know what was issued at the time of 2005. 4 BY MR. SHULMAN: 5 Q. I understand. 6 A. Yeah, I know. 7 Q. That's why I said one or more. 8 A. Well, it could be none or more if there was 9 none that were issued. I just don't know what was 10 issued. 11 Q. All right. We'll get to that in a moment. 12 And that lawsuit where he was claiming 13 inventorship was eventually settled in 2008. Correct? 14 A. Correct. 15 MR. SHULMAN: Let me mark as Exhibit 16 the 16 release and settlement agreement between Dr. Czarnik 17 which is C-z-a-r-n-i-k, and Illumina. 18 (Exhibit 16 was marked.) 19 BY MR. SHULMAN: 20 Q. You see Mr. Flatley's signature on page 7 of 21 the agreement? 22 A. Just a moment. I'm just trying to refresh my</p>
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<p>1 family. If you can -- I'm sure you have that 2 information.</p> <p>3 If there was, then I have no objection to your 4 question.</p> <p>5 If by some chance there was no issued patents 6 or one issued patent from this patent family, then your 7 question wouldn't be correct. So I just don't know how 8 many patents were issued. I know there were several 9 patent applications.</p> <p>10 BY MR. SHULMAN:</p> <p>11 Q. And he was claiming, in addition to the patent 12 or patents that had issued that named you as an inventor, 13 he should also be named on the patent applications that 14 named you as an inventor. Correct?</p> <p>15 (Interruption by reporter.)</p> <p>16 BY MR. SHULMAN:</p> <p>17 Q. Is it correct that in Dr. Czarnik's lawsuit 18 against Illumina, he was claiming that he should be named 19 as an inventor on one or more patents that named you as 20 an inventor, as well as on one or more applications on 21 which you were named as an inventor?</p> <p>22 A. Yes.</p>	<p>1 memory about this agreement. 2 Yes, I do see Mr. Flatley's signature on 3 page 7. 4 Q. And do you recognize Mr. Czarnik's signature? 5 A. Yes, I do. 6 Q. Have you seen this settlement agreement before? 7 A. I have a recollection that I at some point read 8 this. 9 Q. Okay. And if you look at paragraph 2.1, which 10 begins at the bottom of page 1 -- 11 A. Okay. 12 [REDACTED]</p> <p>18 Q. Okay. And, consequently, inventorship was 19 corrected on those patents. Correct? 20 A. I believe that's so. 21 Q. Now, Mr. Czarnik was not the only person who 22 ever raised with you whether the inventorship was correct</p>

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1 on Illumina patents that named you as an inventor. 2 Correct? 3 MR. COSTAKOS: Objection. Form. 4 THE WITNESS: I'm sorry. I -- I know that -- I 5 apologize. I'm trying to think, and I'm -- I don't 6 recall anybody -- oh, I think I know where the question 7 is coming from. 8 So I think that's probably yes. 9 BY MR. SHULMAN: 10 Q. Do you know what question you were answering? 11 You just said yes. I'm not sure -- 12 A. I think I was -- 13 Q. I'll ask it again. 14 A. -- answering a question in which somebody has 15 objected to inventorship surrounding other patent 16 applications to which I'm a named inventor. 17 Q. Correct. So Mr. Czarnik was not the only 18 person who ever raised with you whether the inventorship 19 was correct on Illumina patents that named you as an 20 inventor. Correct? 21 MR. COSTAKOS: Objection. Form. 22 THE WITNESS: Correct.	1 MR. SHULMAN: Let me mark as Exhibit 17 a email 2 dated February 24, 2001, from Dr. Kirk to Bryan 3 Benrock -- I'm sorry -- Bryan Roberts at Benrock 4 Associates. It bears production Nos. AFMX 1808332 5 through 8335. 6 (Exhibit 17 was marked.) 7 BY MR. SHULMAN: 8 Q. Have you seen this document before? 9 A. It was shown to me three weeks ago, yes. 10 Q. By who? 11 A. By Illumina's counsel. 12 Q. Okay. And Exhibit 12, the March 9 email, was 13 also shown to you three weeks ago. Correct? 14 A. I'm sorry? 15 Q. The March 9 -- 16 A. Yes, it was. 17 Q. -- 1998 email. 18 Were any of the other emails that I've shown to 19 you today shown to you three weeks ago? 20 A. There might have been one, but I can't remember 21 which one. I sort of remember seeing another document. 22 Q. Where were you when you were shown these
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1 BY MR. SHULMAN: 2 Q. Okay. Who were the other persons who raised 3 such an issue with you? 4 A. The only one that I can recall is Greg Kirk 5 thinking that he had made a contribution to our decoding 6 patent application family. 7 Q. Okay. And Dr. Kirk raised that issue with you 8 in 2001. Correct? 9 A. I think that's correct. 10 Q. Okay. And do you know someone by the name of 11 Bryan Roberts who used to work at a venture firm by the 12 name of Benrock Associates? 13 A. Yes. And to be correct, he still works there. 14 Q. Good. 15 And do you recall that in late February of 16 2001, Mr. Roberts, on behalf of Dr. Kirk, inquired about 17 whether you had used any of Dr. Kirk's oligo decoding 18 ideas set forth in Dr. Kirk's March 9, 1998, email in 19 connection with an Illumina patent application that named 20 you and Mr. Chee and Mr. Czamik as inventors? 21 A. Yes. That email was sent -- was shown to me by 22 Illumina's counsel three weeks ago.	1 documents? 2 A. At Foley's offices at their old location that 3 was south of here. 4 Q. In San Diego? 5 A. San Diego. 6 Q. And who was present at the time? 7 A. Mr. Costakos. 8 Q. Anybody else? 9 A. No. 10 Q. And how long did the meeting last? 11 A. Hour. 12 Q. Was that the only meeting you had concerning 13 these documents? 14 A. No. We had one more meeting yesterday 15 afternoon. 16 Q. How long did that meeting last? 17 A. About an hour and a half. 18 Q. Was anyone else present? 19 A. No. 20 Q. So if you'd look at the third paragraph of 21 Exhibit 17, read that to yourself. 22 In that paragraph, Dr. Kirk stated that he is

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<p>1 forwarding a copy of Illumina's June 1998 patent filing, 2 as well as a copy of his own March 1998 email that he had 3 sent to you and Mr. Bock three years earlier. Do you see 4 that?</p> <p>5 A. I do.</p> <p>6 MR. SHULMAN: Now, let me mark as the next 7 exhibit a copy of the patent filing that's identified as 8 an attachment to his email, and that's Exhibit 18. 9 (Exhibit 18 was marked.)</p> <p>10 BY MR. SHULMAN:</p> <p>11 Q. And this exhibit is a copy of an international 12 application published under the Patent Cooperation Treaty 13 that has No. W099/67641 naming Mr. Chee, Dr. Stuelpnagel, 14 and Dr. Czarnik as inventors. And this is a copy of 15 the -- I'm sorry. This patent application is entitled 16 "Decoding of array sensors with microspheres." Correct?</p> <p>17 A. Where's the title?</p> <p>18 Yes.</p> <p>19 Q. And this patent application, on the first page, 20 claims priority from a June 1998 application filed in the 21 United States. Do you see that?</p> <p>22 A. Yes.</p>	<p>1 oligo decoding idea in his March 1998 email. Do you see 2 that?</p> <p>3 A. I do.</p> <p>4 Q. And Mr. Roberts, who received Exhibit 17, 5 forwarded to you Dr. Kirk's February 24, 2001, email. 6 Correct?</p> <p>7 A. Based upon the documents that I was shown by 8 Illumina's counsel, that's correct.</p> <p>9 Q. And you read the forwarded -- forwarded 10 February 24, 2001, email and responded to it on 11 February 26 of 2001?</p> <p>12 MR. COSTAKOS: Objection. Form.</p> <p>13 BY MR. SHULMAN:</p> <p>14 Q. Right?</p> <p>15 MR. COSTAKOS: Foundation.</p> <p>16 THE WITNESS: You'd have to show me the 17 documents before I could agree that that was the date and 18 the timing. I'm sorry. I just don't remember that kind 19 of detail.</p> <p>20 MR. SHULMAN: Okay. Here they are. Paralegals 21 are so organized, I'm disorganized.</p> <p>22 Exhibit 19, please mark a document bearing</p>
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<p>1 Q. Okay. And the number of this application, 2 namely 67641, filed in '99 matches the number in the 3 attachment to Dr. Kirk's email. Correct?</p> <p>4 A. Yes.</p> <p>5 Q. Okay. Dr. Kirk's email being Exhibit 17. 6 Now, the March 1998 email to you and Mr. Bock 7 is copied into the body of Dr. Kirk's February 24, 2001, 8 email, Exhibit 17. Do you see that?</p> <p>9 A. I do.</p> <p>10 Q. Okay. Now, let's look at the third sentence of 11 this February 24, 2001, email.</p> <p>12 In there, Dr. Kirk stated that "It really seems 13 like I did outline the approach of binding and stripping, 14 decoding oligos in order to calibrate the location of 15 each cDNA-containing bead prior to use in an assay." Do 16 you see that?</p> <p>17 A. I see that.</p> <p>18 Q. And with respect to this oligo decoding idea 19 contained in his March 1998 email, in the last sentence 20 of the third paragraph of Exhibit 17, Dr. Kirk says that 21 he would like to ask if any of the three inventors on the 22 attached Illumina patent filing was motivated by his</p>	<p>1 production No. AFMX 1808299 through 300. 2 (Exhibit 19 was marked.)</p> <p>3 BY MR. SHULMAN:</p> <p>4 Q. Do you see the top of this email chain is an 5 email from Bryan Roberts to Greg Kirk dated February 26 6 2001?</p> <p>7 A. Yes.</p> <p>8 Q. And you're shown as a carbon copy recipient of 9 that email. Correct?</p> <p>10 A. It's shown that way, yes.</p> <p>11 Q. Do you have any reason to doubt that you 12 received a copy of Mr. Roberts' February 26, 2001, email?</p> <p>13 A. I --</p> <p>14 MR. COSTAKOS: Objection. Form.</p> <p>15 THE WITNESS: I have no reason to assume that I 16 did not receive a copy.</p> <p>17 BY MR. SHULMAN:</p> <p>18 Q. Okay. And by this February 26 email, 19 Mr. Roberts is forwarding to Dr. Kirk an email that you 20 sent to Mr. Roberts earlier that same day. Correct?</p> <p>21 A. Yes.</p> <p>22 Q. And your email to Mr. Roberts responds to</p>

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<p>1 Dr. Kirk's inquiry that we saw in Exhibit 18 -- I'm 2 sorry -- Exhibit 17. Do I have the numbers wrong here? 3 Exhibit 17, yes. Let me start over. 4 And your email to Mr. Roberts contained in 5 Exhibit 19 responds to Dr. Kirk's inquiry contained in 6 Exhibit 17 about whether any of the three inventors on 7 the Illumina patent was motivated by Dr. Kirk's oligo 8 decoding ideas set forth in his March 1998 email. 9 Correct?</p> <p>10 MR. COSTAKOS: Object -- objection. Form, 11 foundation.</p> <p>12 THE WITNESS: I'm sorry. Could you ask again, 13 please?</p> <p>14 MR. SHULMAN: Sure.</p> <p>15 BY MR. SHULMAN:</p> <p>16 Q. Your email of February 26 that is contained in 17 Exhibit 19 responds to Dr. Kirk's inquiry about 18 inventorship that is set forth in Exhibit 17. Correct?</p> <p>19 MR. COSTAKOS: Same objections.</p> <p>20 THE WITNESS: Yes.</p> <p>21 BY MR. SHULMAN:</p> <p>22 Q. Okay. And let's look at what you said in your</p>	<p>1 A. I don't have any idea what I did with my emails 2 in my email account.</p> <p>3 Q. Okay. But at the time that you wrote the email 4 in Exhibit 19, you were no longer at CW. Right?</p> <p>5 A. Yes.</p> <p>6 Q. You were at Illumina?</p> <p>7 A. That's right.</p> <p>8 Q. And where would the copies of your emails that 9 you received and sent in February of 2001 reside?</p> <p>10 MR. COSTAKOS: Objection. Foundation.</p> <p>11 THE WITNESS: If Illumina has them, they would 12 reside at Illumina.</p> <p>13 BY MR. SHULMAN:</p> <p>14 Q. Did Illumina have a policy about preserving 15 emails?</p> <p>16 A. They encouraged us to clean up our email 17 because it was taking up too much of the server time. I 18 don't know -- I'm trying to remember what the formal 19 policy was.</p> <p>20 Q. Anyway, after thanking Bryan Roberts for 21 sending you the email that Greg had saved, you go on to 22 say, "I have reviewed the email and discussed it with</p>
<p>1 email of February 26, 2001. 2 First you thanked Mr. Roberts for sending you 3 Dr. Kirk's March 1998 email that Dr. Kirk had saved. Do 4 you see that?</p> <p>5 A. Yes.</p> <p>6 Q. Okay. Were you surprised that Dr. Kirk had 7 saved his March '98 email?</p> <p>8 MR. COSTAKOS: Objection. Form.</p> <p>9 THE WITNESS: I have -- I have no idea whether 10 I was surprised or not. I don't -- can't remember back 11 that many years to understand what my motivation might 12 have been.</p> <p>13 BY MR. SHULMAN:</p> <p>14 Q. Did you save a copy of Dr. Kirk's email in 15 1998?</p> <p>16 A. No, I would not have.</p> <p>17 Q. Do you know what happened to the copies of the 18 1998 email that you received from Dr. Kirk?</p> <p>19 A. No. Because they would have stayed with 20 CW Group, and I don't have any idea what they did with my 21 old email account.</p> <p>22 Q. Okay.</p>	<p>1 Mark Chee." Do you see that?</p> <p>2 A. I do.</p> <p>3 Q. Was that a true statement?</p> <p>4 A. I assume it was if I wrote it.</p> <p>5 Q. Okay. And what did you and Mr. Chee discuss?</p> <p>6 A. Probably the issue that was raised in the email 7 that Greg Kirk had sent to Bryan, specifically whether we 8 were motivated by anything Greg had told us in developin 9 the oligo decoding methods that Illumina uses.</p> <p>10 Q. Okay. And do you see that you copied Nicky 11 Espinosa on your February 26 email?</p> <p>12 A. I see that.</p> <p>13 Q. Why did you do that?</p> <p>14 A. She was in charge of intellectual property at 15 that time.</p> <p>16 Q. So why did you copy her?</p> <p>17 A. Because it would have been appropriate for 18 something that was dealing with inventorship that she be 19 informed of that and have a record of it for her own use 20 if she wanted to keep a record.</p> <p>21 Q. Would she -- would you have sent her not only 22 your email but the email you received from Mr. Roberts</p>

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1 that is contained in -- that he forwarded to you, rather?	1 standard for me to communicate with her. And what I
2 A. Well --	2 don't know is whether I would have done that through a
3 MR. COSTAKOS: Objection. Form.	3 forwarded email or whether I would have walked to the
4 THE WITNESS: -- I don't want to be paranoid	4 cube next door, because that's where she sat, and talked
5 here, but I think that that might not have happened like	5 to her about it.
6 that. So unless you have a document that Mr. --	6 MR. SHULMAN: Okay. We need to take a break
7 Dr. Roberts had sent me an email, I have a vague	7 because we're running out of tape.
8 recollection that he actually called me on the phone as	8 VIDEOGRAPHER: This is the end of disk No. 2 of
9 opposed -- and said, "Hey," you know, "Greg's worried	9 Volume I. We're off the record at 3:05 p m.
10 about your decoding patents and inventorship on that."	10 (Recess.)
11 I'm not sure there was actually an email.	11 VIDEOGRAPHER: This is the beginning of disk 3
12 Somehow Dr. Roberts communicated to me that Greg had an	12 of Volume I. We're on the record at 3:19 p m.
13 issue that needed to be addressed.	13 BY MR. SHULMAN:
14 What I don't know is whether that was through	14 Q. Dr. Stuelpnagel, so do you believe that either
15 an email or a telephone call. And unless you can help my	15 by hard copy, walking it down the hallway, or by sending
16 recollection with documents, I just don't know.	16 it by email, you would have sent to Miss Espinosa the
17 BY MR. SHULMAN:	17 March 9, 1998, email that Bryan Roberts had forwarded to
18 Q. Why don't you look at your email of	18 you that was the basis for the underlying inquiry?
19 February 26.	19 MR. COSTAKOS: Objection. Form, foundation.
20 A. Okay.	20 THE WITNESS: I have no idea.
21 Q. In the second paragraph, first sentence, you	21 ///
22 wrote to Mr. Roberts, Dr. Roberts, "Thanks also for	22 BY MR. SHULMAN:
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1 sending me the email that Greg had saved."	1 Q. You believe that would have been your practice?
2 A. Fine. That solves that question that I had. I	2 MR. COSTAKOS: Same objections.
3 appreciate the help there.	3 THE WITNESS: I have no idea.
4 Q. So you had a copy of it. Right?	4 BY MR. SHULMAN:
5 A. Absolutely.	5 Q. Okay. Did you have any discussions with
6 Q. Okay.	6 Miss Espinosa about the subject matter addressed in your
7 A. Thank you for helping me.	7 email of February 26?
8 Q. And did you send a copy to Nicky Espinosa to	8 MR. COSTAKOS: Objection. Foundation.
9 give her the full picture of what was going on here?	9 THE WITNESS: I cannot recall specific
10 A. I have no idea because it's -- I didn't even	10 conversation about it.
11 remember whether Bryan had called me or emailed me about	11 BY MR. SHULMAN:
12 this issue. I have no idea -- I had no idea whether I	12 Q. Do you recall generally discussing it with her?
13 received -- I had no idea -- I had no remembrance of	13 A. No.
14 receiving the email; so I have absolutely no idea whether	14 Q. So you stated in the second paragraph of your
15 I forwarded that email on to Nicky or not.	15 February 26 email that you've reviewed the email and
16 Q. Would it have been your practice, in order to	16 discussed it with Mark Chee. Do you see that?
17 keep Miss Espinosa apprised of this important	17 A. I'm sorry. What was the exhibit number again,
18 inventorship issue, to inform her of what the basis was	18 please?
19 for the inquiry that caused you to write this response?	19 Q. Exhibit 19?
20 MR. COSTAKOS: Objection. Form, foundation.	20 A. Exhibit 19.
21 THE WITNESS: And what I'm trying to be careful	21 Yes.
22 of is I don't know in what form it would have been	22 Q. Okay. And did you provide Mr. Chee with a copy

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1 of the March 1998 email?	1 "Congratulations on having Greg Kirk join" --
2 MR. COSTAKOS: Lacks foundation.	2 BY MR. SHULMAN:
3 THE WITNESS: I have no idea.	3 Q. Paragraph --
4 BY MR. SHULMAN:	4 A. -- "Surface Logic. I am sure he will be a
5 Q. You just don't recall?	5 valuable contributor." Am I looking at the wrong place
6 A. Don't recall.	6 Q. Yes, you are, because I said the paragraph
7 Q. One way or the other?	7 numbered one.
8 A. That's correct.	8 A. Paragraph numbered one. Okay.
9 Q. Okay. But you read the email. Right?	9 Q. And there you referred to "Greg's invention,"
10 A. I would assume I read the email.	10 quote-unquote. Correct?
11 Q. Well, you said you did right here. Right?	11 A. Okay.
12 A. Fair enough.	12 Q. Yes?
13 Q. Okay.	13 A. Yes, yes.
14 A. I haven't, again, memorized this email to know	14 Q. And in paragraph No. 2, you said, "We don't use
15 everything I said in this email either.	15 Greg's invention." You see that?
16 Q. Okay. And in your February 26, 2001, email,	16 MR. COSTAKOS: Objection. Out of context.
17 you referred to the idea set forth in Dr. Kirk's March	17 THE WITNESS: I do see that.
18 1998 email as "Greg's invention." Do you see that?	18 MR. COSTAKOS: Form.
19 MR. COSTAKOS: Where are you -- where are you	19 BY MR. SHULMAN:
20 referring to?	20 Q. So you twice referred to Greg's ideas as
21 MR. SHULMAN: If he needs help, I'll give it to	21 "Greg's invention." Correct?
22 him.	22 MR. COSTAKOS: Same objections.
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1 THE WITNESS: Yes, please.	1 THE WITNESS: Yes.
2 BY MR. SHULMAN:	2 BY MR. SHULMAN:
3 Q. You said that in the first sentence of the	3 Q. Okay. And Greg is Dr. Kirk. Right?
4 paragraph numbered one. Right? Correct?	4 A. Yes.
5 MR. COSTAKOS: Wait, wait. Hold on. What	5 Q. Okay. Now, in the sentence that says, quote,
6 say the question all over again.	6 "We do not use Greg's invention," who is the "we" in that
7 BY MR. SHULMAN:	7 sentence?
8 Q. Isn't it true that in your email of February 26	8 A. I would assume it was Illumina.
9 you referred to Greg's ideas as "Greg's invention"?	9 Q. Was it Illumina, or was it you, Czarnik, and
10 MR. COSTAKOS: Objection. Mischaracterizes	10 Chee?
11 THE WITNESS: I don't see that, so if you could	11 MR. COSTAKOS: Objection. Asked and answered.
12 just refer me --	12 THE WITNESS: Since it's present tense, I
13 BY MR. SHULMAN:	13 assume it means Illumina.
14 Q. Sure.	14 BY MR. SHULMAN:
15 A. -- to the right sentence, I'll be happy to	15 Q. Okay. Now, which of Dr. Kirk's inventions set
16 reread that.	16 forth in his March 1998 email were you referring to when
17 Q. Look at the paragraph numbered one in your	17 you stated that, quote, "We do not use Greg's invention"?
18 February 26 email. There you referred to "Greg's	18 A. Ask the question again, please.
19 invention." Correct?	19 Q. Which of Dr. Kirk's inventions set forth in his
20 MR. COSTAKOS: Objection. Mischaracterizes	20 March 1998 email were you referring to when you stated in
21 out of context, form.	21 your email that, quote, "We do not use Greg's invention"?
22 THE WITNESS: Paragraph 1 to me says,	22 MR. COSTAKOS: Objection. Form.

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<p>1 THE WITNESS: And, again, I apologize because 2 I'm overly suspicious of your motives. You used the term 3 "inventions" to characterize Greg's email.</p> <p>4 I think you've pointed out to me that I used 5 "Greg's invention," singular, here. And so when you ask 6 which of Greg's inventions, that would be assuming that I 7 thought there were many inventions in his email, and I 8 don't see any support for that in this email. Perhaps 9 you have it somewhere else.</p> <p>10 MR. SHULMAN: No. Let me rephrase the question 11 since you're quite picky.</p> <p>12 BY MR. SHULMAN:</p> <p>13 Q. Which invention of Dr. Kirk's were you 14 referring to in your email when you stated, quote, "We do 15 not use Greg's invention"?</p> <p>16 MR. COSTAKOS: I'm going to object to the 17 preface of that question. In the future, it really would 18 be better if you would just ask your question and not 19 comment on the witness's testimony. Okay?</p> <p>20 BY MR. SHULMAN:</p> <p>21 Q. Can you answer the question?</p> <p>22 MR. COSTAKOS: So -- why don't we have the</p>	<p>1 that had been made of me around our decoding. I don't 2 think I was evaluating anything other than Greg's 3 comments about decoding in my response email.</p> <p>4 BY MR. SHULMAN:</p> <p>5 Q. Now, could you please answer my question, and 6 I'll ask it again.</p> <p>7 Is it correct that you were not referring to 8 Greg's idea of simultaneously inserting an array of 9 fiberoptic arrays into individual wells of a microtiter 10 well plate because Illumina was, in fact, using that 11 idea?</p> <p>12 MR. COSTAKOS: Objection. Form. That's 13 argumentative. And I suggest you improve your tone, 14 Counsel. Okay?</p> <p>15 BY MR. SHULMAN:</p> <p>16 Q. Can you answer that, please?</p> <p>17 A. I think I'd like a break.</p> <p>18 MR. COSTAKOS: Okay.</p> <p>19 THE WITNESS: I'm just getting a little 20 frustrated.</p> <p>21 MR. SHULMAN: Okay. We just took a break five 22 minutes ago.</p>
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<p>1 question read back without the paraphrase or the preface.</p> <p>2 THE REPORTER: "Q. Which invention of 3 Dr. Kirk's were you referring to in your email when you 4 stated, quote, 'We do not use Greg's invention'?"</p> <p>5 THE WITNESS: I assume that I was specifically 6 addressing Greg's concern about his ideas for decoding 7 the beads.</p> <p>8 BY MR. SHULMAN:</p> <p>9 Q. So you were referring to the oligo-detecting 10 invention?</p> <p>11 MR. COSTAKOS: Objection. Form.</p> <p>12 THE WITNESS: His format in which he did that 13 yes.</p> <p>14 BY MR. SHULMAN:</p> <p>15 Q. Okay. You were not referring to his idea of 16 simultaneously inserting an array of fiberoptic arrays 17 into individual wells of a microtiter well plate because 18 Illumina was using that idea. Right?</p> <p>19 MR. COSTAKOS: Objection. Form.</p> <p>20 THE WITNESS: I think first -- there's a couple 21 of questions there, aren't there?</p> <p>22 I think I was being responsive to the inquiry</p>	<p>1 THE WITNESS: Yeah, well, I'm taking another 2 one.</p> <p>3 MR. SHULMAN: All right.</p> <p>4 VIDEOGRAPHER: Off the record at 3:26.</p> <p>5 (Recess.)</p> <p>6 VIDEOGRAPHER: We're on the record at 3:34 p.m.</p> <p>7 BY MR. SHULMAN:</p> <p>8 Q. During the break, Dr. Stuelpnagel, did you 9 speak with your counsel about the deposition?</p> <p>10 A. No, I did not.</p> <p>11 Q. Okay. So going back to the question that was 12 pending before you took a break, is it correct that in 13 your February 26, 2001, email you were not referring to 14 Greg's idea of simultaneously inserting an array of 15 fiberoptic arrays into individual wells of a microtiter 16 well plate because Illumina was, in fact, using that 17 idea?</p> <p>18 MR. COSTAKOS: Objection. Form, asked and 19 answered, compound.</p> <p>20 THE WITNESS: First I'd like to apologize to 21 the court reporter and the videographer and the attorneys 22 in the room for having to take a break.</p>

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<p>1 My frustration level with you, Counsel, has 2 risen to a point where I want to make sure I continue to 3 give very accurate answers to questions in which you 4 create implications that are not substantiated by fact or 5 background.</p> <p>6 The question that's on the record right now has 7 multiple components to it; so let me answer those 8 individually.</p> <p>9 The first component is about whether I was 10 referring to the decoding ideas of Greg Kirk or his ideas 11 of using multiple arrays.</p> <p>12 The answer there is very clear. I was 13 referring to his decoding ideas and that they were not 14 things that we think we had developed at Illumina.</p> <p>15 Your other question implied that somehow we 16 were using Kirk's idea in the use of our arrays and that 17 we somehow knowingly did that. I don't also agree that 18 that's a correct characterization of what we were doing.</p> <p>19 We developed an ArrayMatrix product. That, I 20 have testified to. And it does simultaneously address 21 multiple wells in a microtiter plate.</p> <p>22 BY MR. SHULMAN:</p>	<p>1 we were doing at Illumina.</p> <p>2 Q. Okay. But the idea that he had, plainly, is 3 documented in March of 1998. Correct?</p> <p>4 A. There is a –</p> <p>5 MR. COSTAKOS: Objection. Form.</p> <p>6 THE WITNESS: -- one-sentence or two-sentence 7 discussion about that, yes.</p> <p>8 BY MR. SHULMAN:</p> <p>9 Q. Okay. And that idea –</p> <p>10 MR. COSTAKOS: Form.</p> <p>11 BY MR. SHULMAN:</p> <p>12 Q. -- was communicated to you in March of '98 by 13 the email. Correct?</p> <p>14 MR. COSTAKOS: Objection -- I'm sorry. 15 Objection. Foundation, form.</p> <p>16 THE WITNESS: I'm sorry. Bouncing between the 17 objections.</p> <p>18 I saw the email, yes.</p> <p>19 BY MR. SHULMAN:</p> <p>20 Q. Okay. And apart from the testimony that you've 21 given on prior occasions which you've repeated here 22 today, can you point to anything to demonstrate that you</p>
<p style="text-align: center;">Page 230</p> <p>1 Q. Okay. You were using the idea at Illumina in 2 2001 of simultaneously inserting an array of fiberoptic 3 arrays into individual wells of a microtiter well plate. 4 Correct?</p> <p>5 A. Correct.</p> <p>6 Q. Okay. And that idea is documented in 7 Exhibit 12, which is months before you claim to have come 8 up with it in the summer of '98. Right?</p> <p>9 MR. COSTAKOS: Objection. Form.</p> <p>10 THE WITNESS: It is in that email, yes.</p> <p>11 BY MR. SHULMAN:</p> <p>12 Q. And that email is months before you claim to 13 have come up with the idea in the summer of '98. 14 Correct?</p> <p>15 A. Before I contributed to that, yes.</p> <p>16 Q. Did Mr. Kirk contribute to it?</p> <p>17 A. I – I think where I am stumbling and – and 18 don't know how to correctly answer is it's clear that he 19 had the idea.</p> <p>20 Where I think there is a difference of opinion 21 is whether that was the invention that we have in our 22 patents and whether that was sufficiently similar to what</p>	<p style="text-align: center;">Page 232</p> <p>1 conception in the summer of '98 was not derived from the 2 information that Dr. Kirk provided to you in his email of 3 March of 1998?</p> <p>4 MR. COSTAKOS: Objection. Form.</p> <p>5 THE WITNESS: I think we've gone over that 6 multiple times. And so, again, I apologize for my 7 frustration.</p> <p>8 I think the answer that I've given, and I will 9 continue to give, is I have no indication that I did 10 not -- that I -- I have no knowledge of using Greg's 11 email in the formation of what became Illumina's products 12 and that patent application.</p> <p>13 MR. SHULMAN: That's not what I asked.</p> <p>14 BY MR. SHULMAN:</p> <p>15 Q. I said, can you point to anything other than 16 your own testimony to demonstrate that you did not derive 17 from Dr. Kirk the idea that you claim to have come up 18 with in the summer of '98?</p> <p>19 MR. COSTAKOS: Objection. Form.</p> <p>20 THE WITNESS: No.</p> <p>21 BY MR. SHULMAN:</p> <p>22 Q. Now, in the paragraph numbered three in this</p>

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<p>1 February 26 email, Exhibit 19, on the back you state that 2 the method of decoding that Illumina uses was invented by 3 Mark Chee before he joined Illumina. Do you see that?</p> <p>4 A. I do.</p> <p>5 Q. And then you state that upon joining Illumina, 6 Mr. Chee assigned that invention to Illumina. Do you see 7 that?</p> <p>8 A. I do.</p> <p>9 Q. What was the method of decoding that was 10 invented by Chee?</p> <p>11 A. An oligo-based method using longer oligos and a 12 combinatorial collection of probes to decode large data 13 sets.</p> <p>14 Q. And how did it differ from Dr. Kirk's oligo 15 decoding invention?</p> <p>16 A. I'd have --</p> <p>17 MR. COSTAKOS: Objection. Foundation.</p> <p>18 THE WITNESS: I'd have to go back and review 19 Dr. Kirk's email. I'm happy to do that right now.</p> <p>20 BY MR. SHULMAN:</p> <p>21 Q. If you want. Or you can also look at how you 22 distinguished it in your own email.</p>	<p>1 Q. But you and Mr. Chee did go over the March 1998 2 email in February of 2001. Correct?</p> <p>3 MR. COSTAKOS: Objection. Form.</p> <p>4 THE WITNESS: It appears from this email, but I 5 don't know which email, so I'm going to back up because, 6 again, I don't want to be tricked here.</p> <p>7 I do not remember ever sharing Greg's email to 8 Mark prior to today.</p> <p>9 Now, I guess there's some ambiguity what -- 10 which Greg email that I was to share, but if I was 11 referring to Greg's 1998 March email that we've been 12 looking at today, I would agree that I'd never shared it 13 with him, but it looks like I probably did share it with 14 him on this date or thereabouts.</p> <p>15 BY MR. SHULMAN:</p> <p>16 Q. Okay. Now, you didn't tell Dr. Roberts that 17 you don't recall ever seeing Kirk's March 1998 email, did 18 you?</p> <p>19 A. No.</p> <p>20 Q. If that were the case, why didn't you?</p> <p>21 MR. COSTAKOS: Objection. Form.</p> <p>22 THE WITNESS: Consistent with my testimony</p>
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<p>1 A. Fair enough.</p> <p>2 Q. That's a little bit shorter. But look at 3 whatever you want to to answer the question.</p> <p>4 A. In my own email, I point to the fact that Greg 5 talked about using short oligos. Having looked at that 6 email, I think it's six to eight mers, m-e-r-s, and we 7 didn't do that, nor would it work.</p> <p>8 Q. Why did you tell Bryan Roberts that Mr. Chee 9 had assigned his invention to Illumina?</p> <p>10 A. Mr. Robert -- Dr. Roberts is a -- an investor 11 in Illumina, and I wanted to be clear that we had 12 resolved any potential inventorships between things that 13 Mark might have invented before he joined Illumina that 14 related to the Illumina technology.</p> <p>15 Q. So you wanted to demonstrate to Dr. Roberts 16 that Illumina, in fact, owned Mr. Chee's invention?</p> <p>17 A. Yes. I think that's what I stated here.</p> <p>18 Q. Okay. Now, in paragraph No. 3 on the back of 19 this exhibit, you state that you don't remember ever 20 sharing Dr. Kirk's March 1998 email with Mark Chee prior 21 to February 26, 2001. Correct?</p> <p>22 A. That's what I wrote here, yes.</p>	<p>1 today, I'm under the assumption that I did see Greg's 2 March 1998 email. I just don't remember it after March 3 1998.</p> <p>4 BY MR. SHULMAN:</p> <p>5 Q. Well, that was my question.</p> <p>6 Why didn't you tell Dr. Roberts that you don't 7 recall having seen the March 1998 email?</p> <p>8 A. I have no idea why I wrote exactly the words I 9 wrote. I wrote the words I wrote in this email.</p> <p>10 Q. It was a much simpler explanation to 11 Dr. Roberts to simply tell him, "I don't remember ever 12 having seen Greg's email," rather than the elaborate 13 explanation that you gave in paragraph 4. Correct?</p> <p>14 MR. COSTAKOS: Objection. Form.</p> <p>15 THE WITNESS: I'm now -- which -- are you 16 talking about numbered paragraph 4, or are you talking 17 about 1, 2, 3, 4 paragraph -- fourth paragraph?</p> <p>18 MR. SHULMAN: Let me rephrase the question.</p> <p>19 THE WITNESS: Yes.</p> <p>20 BY MR. SHULMAN:</p> <p>21 Q. Turn to the paragraph numbered four.</p> <p>22 A. Okay.</p>

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<p>1 Q. There you state that although your name appears 2 on the Illumina patent, about which Dr. Kirk inquired, 3 your contribution to the patent that he was inquiring 4 about has nothing to do with the oligo decoding method 5 that Illumina uses. Do you see that?</p> <p>6 A. Yes.</p> <p>7 Q. And you go on to say that because you made no 8 contribution to Illumina's oligo decoding method, it is 9 obvious that you did not use any of the oligo decoding 10 information that Kirk sent to you in his March 1998 11 email. Correct?</p> <p>12 A. Yes. That Illumina did not use.</p> <p>13 Q. Correct.</p> <p>14 And in this email of yours dated February 26, 15 you didn't tell Dr. Roberts, "Of course, I didn't use 16 Kirk's information because I don't even recall having 17 read the email," did you?</p> <p>18 MR. COSTAKOS: Objection. Form.</p> <p>19 THE WITNESS: I wrote what I wrote.</p> <p>20 MR. COSTAKOS: The document speaks for itself.</p> <p>21 BY MR. SHULMAN:</p> <p>22 Q. Okay. And that's a much simpler explanation,</p>	<p>1 you had reviewed back in March of '98 when you first 2 received Kirk's email?"</p> <p>3 MR. COSTAKOS: Objection. Form.</p> <p>4 THE WITNESS: The only recollection I have is 5 making sure that I understood what Greg was claiming 6 about an oligo decoding method and how we decode oligo 7 and making sure that I properly assigned contributions to 8 the respective parties.</p> <p>9 I don't think I focused at all on anything in 10 that email other than the oligo decoding in February. I 11 would have had no reason to.</p> <p>12 BY MR. SHULMAN:</p> <p>13 Q. Well, you had to read the entire email -- March 14 1998 email in February of 2001 to see what Kirk had to 15 say about oligos. Right?</p> <p>16 MR. COSTAKOS: Objection. Form.</p> <p>17 THE WITNESS: I'm sure I read the email at some 18 level of superficiality or maybe in great depth. I don't 19 recall.</p> <p>20 I remember that it was appropriate for me to 21 concentrate on the oligo piece because that's what, in 22 fact, was being raised as a question mark.</p>
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<p>1 if, in fact, it were true, than the elaborate explanation 2 you put together in paragraph 4, isn't it?</p> <p>3 MR. COSTAKOS: Objection. Form, argumentative.</p> <p>4 THE WITNESS: I actually think that this is a 5 more satisfactory answer for Greg. And I would have, if 6 I were Greg receiving this information, been happy with 7 this information that I provided him.</p> <p>8 BY MR. SHULMAN:</p> <p>9 Q. When you received and reviewed the March 1998 10 email in February of 2001 and read it in order to respond 11 to Bryan Roberts, did it refresh your recollection about 12 the subject matter that you had reviewed back in March of 13 '98 when you first received Kirk's email?</p> <p>14 MR. COSTAKOS: Objection. Form.</p> <p>15 THE WITNESS: I'm sorry. I really have a hard 16 time following your questions. Could you simplify that 17 one for me, please.</p> <p>18 MR. SHULMAN: No. But we can read it back.</p> <p>19 THE REPORTER: "Q. When you received and 20 reviewed the March 1998 email in February of 2001 and 21 read it in order to respond to Bryan Roberts, did it 22 refresh your recollection about the subject matter that</p>	<p>1 BY MR. SHULMAN:</p> <p>2 Q. Sure. But you had to read through the entire 3 Kirk email from March of '98 in order to find out where 4 the oligo piece was. Right?</p> <p>5 MR. COSTAKOS: Objection. Asked and answered.</p> <p>6 THE WITNESS: I think that's a fair assumption.</p> <p>7 BY MR. SHULMAN:</p> <p>8 Q. Okay. And upon reading through the entire Kirk 9 email in February of 2001, did it strike you that, Oh, 10 my, he has disclosed here simultaneous dipping of an 11 array of array of fiberoptic bundles into separate wells 12 of a microtiter plate?</p> <p>13 MR. COSTAKOS: Objection. Form --</p> <p>14 THE WITNESS: No, it did not.</p> <p>15 MR. COSTAKOS: -- foundation.</p> <p>16 BY MR. SHULMAN:</p> <p>17 Q. You just skipped right over that part?</p> <p>18 MR. COSTAKOS: Same objections.</p> <p>19 THE WITNESS: I have no recollection of 20 focusing on it, that it wasn't relevant to the question 21 being raised.</p> <p>22 BY MR. SHULMAN:</p>

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<p>1 Q. Was it relevant to the way things were being 2 done at Illumina with respect to their budding Sentrix 3 ArrayMatrix project?</p> <p>4 MR. COSTAKOS: Objection. Form.</p> <p>5 THE WITNESS: I don't think so because I think 6 that what we invented in June is quite different than 7 what Greg disclosed in his email.</p> <p>8 BY MR. SHULMAN:</p> <p>9 Q. Did what you invented in June include the idea 10 of simultaneously inserting into separate wells of a 11 microtiter well plate separate bundles in an array of 12 array of fiberoptic bundles?</p> <p>13 A. Yes.</p> <p>14 Q. So it was relevant to what you were doing. 15 Correct?</p> <p>16 MR. COSTAKOS: Objection. Form, argumentative.</p> <p>17 THE WITNESS: You asked me what I was focused 18 on. I was focused on addressing Greg's concern that he'd 19 raised with Bryan Roberts around the decoding. That's 20 what I focused on. That's what I was responsive to.</p> <p>21 BY MR. SHULMAN:</p> <p>22 Q. Okay. So there's no doubt that in 2001 you</p>	<p>1 differentiate. It was clear that I needed to look at the 2 oligo methods to be responsive to Greg's inquiry here. 3 It's not clear that I paid any attention to the rest of 4 the email.</p> <p>5 Q. Did you read the entire email?</p> <p>6 A. I have no idea.</p> <p>7 Q. Okay. So that's the truth?</p> <p>8 MR. COSTAKOS: Oh, come on. Let's not do any 9 more of that.</p> <p>10 BY MR. SHULMAN:</p> <p>11 Q. And --</p> <p>12 MR. COSTAKOS: Wait. Hold on, hold on.</p> <p>13 BY MR. SHULMAN:</p> <p>14 Q. -- in 2007 --</p> <p>15 MR. COSTAKOS: Hold on, hold on. He's a third 16 party here. He's here by subpoena, and you cannot behave 17 like that with him or we're going to turn this off and 18 leave. Do you understand that?</p> <p>19 MR. SHULMAN: I heard what you said.</p> <p>20 MR. COSTAKOS: Okay. So why don't you improve 21 your behavior.</p> <p>22 BY MR. SHULMAN:</p>
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<p>1 read Mr. Kirk's -- or Dr. Kirk's March '98 email. 2 Correct?</p> <p>3 MR. COSTAKOS: Objection. Form, foundation.</p> <p>4 THE WITNESS: I at least read the parts around 5 the decoding.</p> <p>6 BY MR. SHULMAN:</p> <p>7 Q. And you told us you had to read the whole thing 8 in order to find out what parts were directed to the 9 decoding. Correct?</p> <p>10 MR. COSTAKOS: Same objections.</p> <p>11 THE WITNESS: Well, again, I'm not -- I don't 12 know. Because if you look at the email, you can actually 13 focus on the one or two paragraphs that he talked about 14 decoding. And so I might have only read those. So I 15 think there is a doubt. I just don't know.</p> <p>16 BY MR. SHULMAN:</p> <p>17 Q. You told us just not five minutes ago that it 18 was a fair assumption to make that you read through the 19 entire email in order to find the oligo decoding parts. 20 Are you now changing your testimony?</p> <p>21 A. It's a question of what you scan through and 22 what you focus on, and that's what I'm trying to -- to</p>	<p>1 Q. In 2007 when you gave your trial testimony in 2 the prior Illumina action, there's no doubt that you had 3 read at least the oligo portion and perhaps the entirety 4 of Kirk's March 1998 email. Correct?</p> <p>5 MR. COSTAKOS: Objection. Form, foundation.</p> <p>6 THE WITNESS: I struggle with your term 7 "no doubt." I don't know what "no doubt" means. 8 All I can say is that there is an email from 9 Greg in March of 1998. I probably read it. What I 10 understood about it and what I concentrated on, I don't 11 recall.</p> <p>12 That email came into question later in 2001 13 around oligos. I responded to the oligo portion. That, 14 I'm certain of. The rest of it I'm just not certain of.</p> <p>15 BY MR. SHULMAN:</p> <p>16 Q. Okay. Was it true that, quote, "I have 17 reviewed the email," when you wrote that to Bryan Robert 18 in February 26 of 2001?</p> <p>19 A. Sure. And what it doesn't say is did I review 20 every word of the email or did I concentrate on the olig 21 portions.</p> <p>22 Q. Fine. So in 2007 there's no doubt that while</p>

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<p>1 you were sitting on the witness stand in the prior 2 litigation you had reviewed the email?</p> <p>3 A. At some level.</p> <p>4 Q. Okay. And in 2007 when you gave your testimony 5 in the prior action, the applications for the 841 and 020 6 patents had not yet issued as patents. Correct? They 7 issued in 2009?</p> <p>8 A. I'll take that as true.</p> <p>9 Q. Okay.</p> <p>10 A. I think to the best of my knowledge, too. I 11 don't follow when these patents issue.</p> <p>12 Q. I'll represent that to you.</p> <p>13 A. Fine. I really appreciate that.</p> <p>14 Q. And if I'm wrong, then this is all useless.</p> <p>15 Between the time that you testified in March of 16 2007 and the time the patents issued in 2009, did you do 17 anything to bring to the attention of the examiner 18 handling your applications for the 841 and 020 patents 19 your 2007 trial testimony or Dr. Kirk's March 1998 email?</p> <p>20 MR. COSTAKOS: Objection. Form. I'm sure this 21 has been asked and answered multiple times as well.</p> <p>22 THE WITNESS: I have no knowledge of doing</p>	<p>1 Q. Well, you knew about it as of February 26, 2 2001?</p> <p>3 A. I never thought about it in the context of the 4 prosecution, and I didn't think about it a whole lot 5 before or after.</p> <p>6 Q. Why did you think it was not relevant, as you 7 mentioned a moment ago?</p> <p>8 A. Because I didn't even think of it. How could I 9 think it's relevant if I didn't even remember that Greg 10 had made any assertions about how to put multiple fibers 11 together.</p> <p>12 Q. Sir, you said a moment ago that "I didn't think 13 it was relevant." So how could you conclude it was not 14 relevant if you hadn't thought about it?</p> <p>15 MR. COSTAKOS: Hold on.</p> <p>16 THE WITNESS: Exactly.</p> <p>17 MR. COSTAKOS: Hold on.</p> <p>18 THE WITNESS: That's what I'm trying to say. I 19 didn't think about it.</p> <p>20 MR. COSTAKOS: There you go.</p> <p>21 We could read back the entire answer. I'm 22 tired of you mischaracterizing his testimony. It's just</p>
<p style="text-align: center;">Page 246</p> <p>1 either one of those. 2 //</p> <p>3 BY MR. SHULMAN:</p> <p>4 Q. Okay. Did you discuss the possibility of doing 5 so with any of the attorneys responsible for the 6 applications that led to the 841 and 020 patents?</p> <p>7 MR. COSTAKOS: Same objections.</p> <p>8 THE WITNESS: I do not.</p> <p>9 BY MR. SHULMAN:</p> <p>10 Q. The question was, did you discuss?</p> <p>11 A. I do not think I did.</p> <p>12 Q. With respect to the examiners handling your 841 13 and 020 patent applications, why is it that you never 14 disclosed to them Dr. Kirk's March 1998 email or its 15 content?</p> <p>16 MR. COSTAKOS: Objection. Form, also asked and 17 answered --</p> <p>18 THE WITNESS: I never --</p> <p>19 MR. COSTAKOS: -- about two hours ago.</p> <p>20 THE WITNESS: I never thought it was relevant. 21 I never -- I never even recalled it, actually.</p> <p>22 BY MR. SHULMAN:</p>	<p style="text-align: center;">Page 248</p> <p>1 not proper, and I think you know it.</p> <p>2 MR. SHULMAN: I'm not mischaracterizing 3 anything.</p> <p>4 MR. COSTAKOS: You absolutely are. You know 5 you are.</p> <p>6 Read his whole answer back.</p> <p>7 BY MR. SHULMAN:</p> <p>8 Q. Did you make a determination about whether the 9 Kirk email was or was not relevant to be disclosed to the 10 examiner handling your patent applications?</p> <p>11 A. No, I did not.</p> <p>12 Q. Okay. Did you make the decision not to 13 disclose Dr. Kirk's March 1998 email or its content to 14 the examiner handling your patent applications?</p> <p>15 MR. COSTAKOS: Objection. Form.</p> <p>16 THE WITNESS: I'm sorry. Could you repeat the 17 question?</p> <p>18 MR. SHULMAN: Sure.</p> <p>19 BY MR. SHULMAN:</p> <p>20 Q. Were you the person who made the decision not 21 to disclose Dr. Kirk's email in March of '98 or its 22 content to the examiner who was handling your 841 and 020</p>

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1 patent applications?	1 Q. I have no reason to believe that you've ever
2 MR. COSTAKOS: Objection. Form.	2 seen this before, but let me just tell you what it is.
3 THE WITNESS: There was no decision made. It	3 I'll make the representation to you.
4 just didn't happen for whatever reason, and I think it's	4 It is the document by which the examiner
5 because I didn't -- I didn't -- I didn't even remember.	5 allowed the claims of the 841 patent to issue as a
6 BY MR. SHULMAN:	6 patent. Will you accept my representation?
7 Q. Did you remember it on February 26, 2001?	7 A. Yes.
8 A. I remember -- I don't even know what I	8 Q. And do you see that it is dated, on the first
9 remembered on February 26, 2001, but what I paid	9 page, date mailed, December 2 of 2008?
10 attention to was the decoding, and that's what I thought	10 A. Where am I supposed to be looking?
11 I took care of here.	11 Q. Here, right on the first page up here, it says
12 Q. Are you saying that you skipped over the	12 "date mailed."
13 portions of the March 1998 email concerning inserting	13 A. Okay.
14 arrays of arrays into microtiter plates when you read it	14 Q. Do you see that?
15 in February of 2001?	15 A. Yes.
16 A. I have no idea.	16 Q. Okay. And after the notice of allowance
17 MR. COSTAKOS: Objection. Form, asked and	17 issued -- pardon me -- in December of 2008 and before the
18 answered.	18 841 patent issued in March of 2009, did you read the
19 BY MR. SHULMAN:	19 allowed claims to satisfy yourself that you were the
20 Q. Okay. Did you ever disclose the March 1998	20 original and first inventor of the subject matter being
21 email to anyone other than Mr. Chee who is referred to as	21 claimed?
22 having had a discussion with you about the email in	22 A. I do not believe I did.
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1 February of 2001?	1 Q. Okay. Do you recall that after these claims
2 A. Would you ask the question again?	2 were allowed, you executed an oath and declaration under
3 Q. Sure.	3 penalty of perjury in which you stated that you and your
4 In your email of February 26, you state	4 co-inventors were the first and original inventors of the
5 somewhere in here that you reviewed Greg's email with --	5 subject matter claimed in this application?
6 or discussed Greg's email with Mark Chee. Do you see	6 A. I -- I don't recall.
7 that? Second paragraph.	7 MR. SHULMAN: All right. Let's mark as
8 A. I do see that I had. Yes, I do see that.	8 Exhibit 21 a transmittal letter from Jerry Hefner to the
9 Q. Okay. So apart from Mr. Chee and whatever	9 patent office in connection with the application that
10 discussion you may have had with him in February of 2001	10 resulted in the issuance of the 841 patent.
11 about Greg's March 1998 email, did you ever discuss or	11 (Exhibit 21 was marked.)
12 disclose that email with anyone else?	12 BY MR. SHULMAN:
13 A. I do not believe so.	13 Q. Do you see that this cover letter -- let's just
14 Q. How about with Larry Bock who was a carbon copy	14 look at the first page first. The cover letter is dated
15 recipient of the email?	15 January 29, 2009. Do you see that?
16 A. I don't believe I did.	16 A. Yes.
17 MR. SHULMAN: Let's mark as Exhibit 20 a notice	17 Q. And the cover letter -- cover letter states
18 of allowance issued by the U.S. Patent and Trademark	18 that it is being submitted in connection with application
19 Office and the application that resulted in issuance of	19 10/767249. Do you see that?
20 the 841 patent.	20 A. I do.
21 (Exhibit 20 was marked.)	21 Q. Okay. And the 841 patent, which I'll show you
22 BY MR. SHULMAN:	22 a copy of, has the same application number. Correct?

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<p>1 A. Okay.</p> <p>2 Q. All right. And in this cover letter, your</p> <p>3 attorney Mr. Hefner stated that pursuant to the</p> <p>4 examiner's request, he is submitting a new declaration of</p> <p>5 inventorship. Do you see that? First page.</p> <p>6 A. Here?</p> <p>7 Q. I'll repeat the question.</p> <p>8 In the cover letter --</p> <p>9 A. Yes.</p> <p>10 Q. -- your attorney Mr. Hefner stated that</p> <p>11 pursuant to the examiner's request, he, Mr. Hefner, is</p> <p>12 submitting a new declaration of inventorship. Do you see</p> <p>13 that?</p> <p>14 A. Pardon me. I -- I'm so distrustful of</p> <p>15 questions at this point in the deposition that when you</p> <p>16 said he was my attorney, I'd actually say he's not my</p> <p>17 attorney. He was Illumina's attorney.</p> <p>18 Q. He was representing you as the applicant for</p> <p>19 this patent. Correct?</p> <p>20 A. He was Illumina's attorney, and I had assigned</p> <p>21 all rights to Illumina.</p> <p>22 Q. Right. And the application was being taken out</p>	<p>1 Q. And that's your signature dated January 14,</p> <p>2 2009?</p> <p>3 A. Right. Yes.</p> <p>4 Q. Okay. And you signed the declaration under the</p> <p>5 penalties set forth in the last big paragraph above your</p> <p>6 signature. Correct?</p> <p>7 A. I signed this, yes.</p> <p>8 Q. Subject to the penalties that are set forth in</p> <p>9 the last big paragraph above your signature. Correct?</p> <p>10 A. Yes.</p> <p>11 Q. Okay. And you acknowledge in this declaration</p> <p>12 that any willful false statements you make in the</p> <p>13 declaration may jeopardize the validity of your</p> <p>14 application or patent. Correct?</p> <p>15 A. I'll let the paragraph speak for itself.</p> <p>16 Q. Well, did you sign that?</p> <p>17 A. I did.</p> <p>18 Q. Okay. And it says, "I hereby declare that all</p> <p>19 statements made herein of my own knowledge are true and</p> <p>20 that all statements made on information and belief are</p> <p>21 believed to be true and, further, that these statements</p> <p>22 were made with the knowledge that willful, false</p>
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<p>1 in your name, Mr. Chee's name, and Mr. Auger's name.</p> <p>2 Right?</p> <p>3 A. Okay. If that qualifies him as my attorney. I</p> <p>4 never thought of him as my attorney.</p> <p>5 Q. Okay. Well, even if he wasn't your attorney,</p> <p>6 he was Illumina's attorney. Right?</p> <p>7 A. Correct.</p> <p>8 Q. And according to this cover letter, Illumina's</p> <p>9 attorney stated that pursuant to the examiner's request,</p> <p>10 he, Illumina's attorney, is submitting a new declaration</p> <p>11 of inventorship. Do you see that?</p> <p>12 MR. COSTAKOS: Objection. Document speaks for</p> <p>13 itself.</p> <p>14 THE WITNESS: Yes.</p> <p>15 BY MR. SHULMAN:</p> <p>16 Q. Okay. And the enclosure with this letter is a</p> <p>17 declaration of inventorship that was signed by you as</p> <p>18 well as Mr. Chee and Mr. Auger. Correct?</p> <p>19 A. Yes.</p> <p>20 Q. Okay. And your signature page is the</p> <p>21 second-to-last page in this exhibit. Correct?</p> <p>22 A. Yes.</p>	<p>1 statements and the like so made are punishable by fine or</p> <p>2 imprisonment or both under Section 1001 of Title 18 of</p> <p>3 the United States Code and that such willful, false</p> <p>4 statements may jeopardize the validity of the application</p> <p>5 or any patent issued thereon."</p> <p>6 That was your understanding at the time.</p> <p>7 Correct?</p> <p>8 A. Yes.</p> <p>9 Q. And one of the statements that you swore to in</p> <p>10 this declaration is that, quote, "I believe the inventors</p> <p>11 named below to be the original and first inventors of the</p> <p>12 subject matter which is described and claimed and for</p> <p>13 which a patent is sought." Do you see that?</p> <p>14 A. Yes.</p> <p>15 Q. And the inventors named below were you, Chee,</p> <p>16 and Auger. Correct?</p> <p>17 A. Yes.</p> <p>18 Q. Okay. And you further swore that the following</p> <p>19 statement is true: "I have reviewed and understand the</p> <p>20 contents of the above-identified application, including</p> <p>21 the claims." Do you see that?</p> <p>22 A. I do see that.</p>

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1 Q. Okay. And was that statement true when made?	1 A. I don't know.
2 A. Yes.	2 Q. Okay. Were you telling the truth when you
3 Q. Okay.	3 said, "I believe that the inventors named below are the
4 A. Well -- I'm sorry. I answered too quickly.	4 original and first inventors of the subject matter which
5 Could you repeat the question?	5 is described and claimed"?
6 Q. Was that statement true when made?	6 A. Because I was familiar with the application, I
7 A. I don't recall whether I read the claims or not	7 assume that that was a true statement.
8 when I signed the statement. And shame on me if I did	8 Q. I didn't ask for an assumption.
9 something wrong.	9 I said, do you know whether or not the
10 Q. You swore that the statements were true.	10 inventors named below were the first and original
11 Correct?	11 inventors of the subject matter that's described and
12 A. Again, if I -- I might have -- I might have	12 claimed?
13 read the claims. I just don't recall whether I read the	13 A. I don't -- I'm sorry. I don't know whether I
14 claims or not at the time that I signed this invention --	14 read the claims before signing this declaration or not.
15 this declaration.	15 Q. Did you take this oath seriously?
16 Q. Well, you -- by signing this you, averred to	16 MR. COSTAKOS: Objection. Argumentative, form.
17 the fact, you swore to the fact that the statement you	17 THE WITNESS: I signed this declaration.
18 made about reviewing and understanding the claims was	18 BY MR. SHULMAN:
19 true. Right?	19 Q. My question was slightly different.
20 A. I understand that.	20 Did you take the oath seriously?
21 Q. So was it true or wasn't it?	21 A. I may have not -- I may or may not have read
22 A. I don't --	22 the claims, and so to the extent that I either took the
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1 MR. COSTAKOS: Objection. Asked and answered.	1 oath seriously or not, I'm sorry.
2 THE WITNESS: I don't recall whether I read the	2 Q. Do you want to take a break?
3 claims when I signed this.	3 A. No. I'm fine.
4 BY MR. SHULMAN:	4 Q. Okay. I don't believe you've answered my
5 Q. So you may have made an untrue statement?	5 question.
6 A. I don't know.	6 The question once again is, did you take the
7 Q. Well, if you don't know, then it follows that	7 oath seriously?
8 you may have made an untrue statement when you stated	8 MR. COSTAKOS: Objection. Form.
9 here that "I have reviewed and understand the claims"?	9 THE WITNESS: I don't know what I thought when
10 MR. COSTAKOS: Objection. Form --	10 I signed this. I thought I was doing what I was supposed
11 THE WITNESS: I understand --	11 to do to validate the patent and get it issued for
12 MR. COSTAKOS: -- mischaracterizes.	12 Illumina.
13 THE WITNESS: -- your interpretation. My	13 BY MR. SHULMAN:
14 testimony is I don't know.	14 Q. Was this just a ministerial act, as far as you
15 BY MR. SHULMAN:	15 were concerned, signing this declaration?
16 Q. Okay. So if you don't know, then you don't	16 MR. COSTAKOS: Objection. Form.
17 know whether you were telling the truth when you swore	17 THE WITNESS: Yes, actually, I thought it was.
18 under oath that you had reviewed the claims. Right?	18 BY MR. SHULMAN:
19 MR. COSTAKOS: Objection. Argumentative.	19 Q. Notwithstanding your acknowledgment that you
20 THE WITNESS: I don't know.	20 could go to prison if you make false statements?
21 BY MR. SHULMAN:	21 A. I understand that.
22 Q. You don't know if you were telling the truth?	22 MR. SHULMAN: Why don't we take a break.

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<p>1 VIDEOGRAPHER: Off the record at 4:07 p.m. 2 (Recess.) 3 VIDEOGRAPHER: We're on the record at 4:15. 4 THE REPORTER: "Q. Notwithstanding your 5 acknowledgment that you could go to prison if you could 6 make false statements? 7 "A. I understand that." 8 MR. SHULMAN: And the question and answer 9 before that? 10 THE REPORTER: "Q. Was this just a ministerial 11 act, signing this declaration? 12 "Mr. Costakos: Objection. Form. 13 "The Witness: Yes, actually, I thought it 14 was." 15 BY MR. SHULMAN: 16 Q. What, if anything, did you do prior to signing 17 the declaration of inventorship in Exhibit 21 to satisfy 18 yourself that the following statement was true? 19 "I believe the inventors named below to be the 20 original and first inventors of the subject matter which 21 is described and claimed and for which a patent is 22 sought."</p>	<p>1 through the period from which it was originally submitted 2 to the date of this declaration of inventorship. And as 3 I just mentioned, I had reviewed the claims during the 4 prosecution of this specific patent. 5 Q. Okay. Let me direct you to issued Claim 1 of 6 the 841 patent and the Kirk email which is Exhibit 12. 7 MR. COSTAKOS: Can you just give me a copy of 8 that 841 patent? 9 MR. SHULMAN: Oh, I'm sorry. 10 And the Kirk email which is Exhibit 12. See if 11 we can dig that one out. 12 BY MR. SHULMAN: 13 Q. Have you got those two documents before you? 14 A. I do. 15 Q. In light of what is set forth in Dr. Kirk's 16 email, can you explain to the judge, to the jury, as well 17 as to the rest of us here, the basis for your sworn 18 statement in January of '09 that you and your first -- 19 I'm sorry -- you and your co-inventors were the original 20 and first inventors of Claim 1 of the 841 patent? 21 MR. COSTAKOS: Objection. Form, foundation. 22 THE WITNESS: As we've discussed before, I</p>
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<p>1 A. I had read the claims when they were being 2 prosecuted. And at that time I had no objection to the 3 inventorship based upon those prosecuted claims. What I 4 don't remember is precisely whether I read the issued 5 claims right before I signed this. 6 Q. Okay. And the claims that you read that you 7 just referred to, when did you read those claims? 8 A. They would have been in probably 2008, 2009 9 time period. 10 Q. Okay. And were the claims that you read at 11 that time directed to this idea of dipping into separate 12 wells of the separate arrays that make up this array of 13 arrays? 14 A. I think it had to do with the two substrates 15 that we looked at when we looked at Claim 1 earlier 16 today. 17 Q. Okay. What did you do to satisfy yourself that 18 this statement was true before you signed your 19 declaration in January of '09? Quote, "I've reviewed and 20 understand the contents of the above-identified 21 application, including the claims." 22 A. So I've reviewed this application many times</p>	<p>1 believe the second substrate is different than anything 2 contemplated by Kirk in his email. 3 BY MR. SHULMAN: 4 Q. Okay. Any other differences? 5 A. That was the one that I think is the most 6 important. 7 Q. Well, I want to know if there are any others. 8 A. I haven't looked at it enough to compare them 9 to -- to know if there's any other differences. 10 Q. Well, I'm asking you to do so now. 11 MR. COSTAKOS: Same objections, also to the 12 extent it calls for a legal conclusion, and on 13 foundation, competence grounds. 14 THE WITNESS: I think it's the second 15 substrate, which is different. 16 BY MR. SHULMAN: 17 Q. Okay. Now, could we return to Exhibit 19, 18 which is your February 26 email. 19 Now, your February 26 email concerned this 20 topic of inventorship of the oligo detection method. 21 Correct? 22 A. Yes.</p>

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<p>1 Q. Okay. And did you understand at the time that 2 the topic of inventorship was important because one of 3 the conditions for obtaining a patent is that the true 4 and correct inventors must be named on your patent 5 applications?</p> <p>6 MR. COSTAKOS: Objection. Form.</p> <p>7 THE WITNESS: Yes.</p> <p>8 BY MR. SHULMAN:</p> <p>9 Q. Okay. And you understood that the true 10 identity of the actual inventors is information that is 11 material to whether or not your patent application can 12 issue as a patent?</p> <p>13 A. Yes.</p> <p>14 MR. COSTAKOS: Objection. Form.</p> <p>15 BY MR. SHULMAN:</p> <p>16 Q. While the applications for your 841 and 020 17 patents were pending before the patent office starting 18 back in 1998, did you regard the information in 19 Dr. Kirk's March 1998 email about simultaneously 20 inserting an array of fiberoptic arrays into individual 21 wells of a well plate as important to identifying who the 22 true inventors were of your claimed invention?</p>	<p>1 requirement, as most companies do, on its hired employees 2 was to make sure that Illumina would own the rights to 3 any inventions that its employees made. Correct?</p> <p>4 A. That's my understanding.</p> <p>5 Q. And since 1998 have you understood that absent 6 such an agreement to assign the inventions to Illumina, 7 Illumina would not own the rights to any such invention?</p> <p>8 MR. COSTAKOS: Objection. Form.</p> <p>9 THE WITNESS: Could -- absent such an 10 agreement. I -- I think -- I'm going to let that be 11 something that an attorney can comment on. I think, 12 actually, there might be laws that say if you're an 13 employee, even if you haven't signed the assignment 14 document, you're --</p> <p>15 ///</p> <p>16 BY MR. SHULMAN:</p> <p>17 Q. You're absolutely right.</p> <p>18 A. Sorry. I don't mean to play an attorney --</p> <p>19 Q. Let me rephrase the question.</p> <p>20 Since 1998, you understood that absent such an 21 agreement, Illumina might not own the rights to any 22 invention made by some person?</p>
<p>1 A. I did not consider it.</p> <p>2 Q. Having looked at it today, do you have a view 3 about whether that information is important?</p> <p>4 MR. COSTAKOS: Objection. Form.</p> <p>5 THE WITNESS: I think that that might be an 6 interpretation that's best left to an attorney. My own 7 perspective is, based upon the claims that issued, no.</p> <p>8 BY MR. SHULMAN:</p> <p>9 Q. Okay. And that's because of the second 10 substrate?</p> <p>11 A. Yes.</p> <p>12 Q. Okay. Now, after Illumina was formed in the 13 spring of 1988 -- I'm sorry -- 1998, it began hiring 14 employees. Correct?</p> <p>15 A. Yes.</p> <p>16 Q. And is it correct, sir, that everyone who was 17 hired as an Illumina employee since April of '98 when it 18 was incorporated had an agreement with Illumina by which 19 they were required to assign to Illumina any inventions 20 they made relating to Illumina's business?</p> <p>21 A. Yes.</p> <p>22 Q. And the reason Illumina imposed such a</p>	<p>1 Page 266</p> <p>2 MR. COSTAKOS: Objection. Form and foundation</p> <p>3 THE WITNESS: I guess that's a possibility.</p> <p>4 BY MR. SHULMAN:</p> <p>5 Q. Okay. Now, in March of 1998, Illumina did not 6 yet exist. Right?</p> <p>7 A. That's -- as a corporate entity, that's 8 correct.</p> <p>9 Q. Okay. And as of March of 1998, Illumina had 10 not hired any employees. Correct?</p> <p>11 A. Correct.</p> <p>12 Q. And as of March 1998, Dr. Kirk had not been 13 hired by Illumina. Correct?</p> <p>14 A. That's correct.</p> <p>15 Q. And, in fact, Illumina never hired Dr. Kirk. 16 Right?</p> <p>17 A. That's right. He turned us down.</p> <p>18 Q. And Dr. Kirk never entered into any agreement 19 with Illumina to assign any of his ideas or his 20 inventions that he came up with to Illumina. Correct?</p> <p>21 A. That's correct.</p> <p>22 Q. And Dr. Kirk never assigned to Illumina any of the inventions or other ideas that he came up with that</p>

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<p>1 are described in his March 1998 email. Correct?</p> <p>2 MR. COSTAKOS: Objection. Form.</p> <p>3 THE WITNESS: And I don't know whether anything</p> <p>4 in Dr. Kirk's email's an invention. I would prefer to</p> <p>5 call those ideas. Inventions, as I understand, are a</p> <p>6 result of a patent application.</p> <p>7 BY MR. SHULMAN:</p> <p>8 Q. Well, you referred to at least the oligo</p> <p>9 decoding idea as Dr. Kirk's invention. Correct?</p> <p>10 A. Yeah, and that was probably -- reading it today</p> <p>11 in this context, that was probably an incorrect reference</p> <p>12 on my part. I think the more accurate way to refer to</p> <p>13 Dr. Kirk's information contained in his email is that</p> <p>14 they're ideas.</p> <p>15 Q. Okay. So let me rephrase the question and use</p> <p>16 the term "ideas."</p> <p>17 Is it correct that Dr. Kirk never assigned to</p> <p>18 Illumina or agreed to assign to Illumina any of the ideas</p> <p>19 that he came up with that are described in his March 1998</p> <p>20 email?</p> <p>21 A. Yes.</p> <p>22 Q. Now, you and Dr. Chee and Mr. Auger assigned</p>	<p>1 Q. Let me ask you a slightly different question.</p> <p>2 Did you understand that if you had named</p> <p>3 Dr. Kirk as a co-inventor on the 841 and 020 patent</p> <p>4 applications, he would have had an ownership interest in</p> <p>5 those patents unless Illumina acquired Dr. Kirk's</p> <p>6 ownership rights from Dr. Kirk?</p> <p>7 A. I never considered it.</p> <p>8 Q. But you understand that today?</p> <p>9 A. I --</p> <p>10 MR. COSTAKOS: Objection to form.</p> <p>11 THE WITNESS: I understand what you're saying,</p> <p>12 yes.</p> <p>13 BY MR. SHULMAN:</p> <p>14 Q. Okay. And had Illumina been forced to acquire</p> <p>15 Dr. Kirk's rights had he been named as an inventor, that</p> <p>16 would have cost Illumina some money. Correct?</p> <p>17 A. I have no idea.</p> <p>18 Q. When you filed the applications for the 841 and</p> <p>19 020 patents, you believed that those applications covered</p> <p>20 a fundamental invention from Illumina as you explained to</p> <p>21 us earlier. Correct?</p> <p>22 A. Correct.</p>
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<p>1 your rights in the 841 and 020 inventions to Illumina at</p> <p>2 or about the time that the original application for those</p> <p>3 inventions were filed. Correct?</p> <p>4 A. Correct.</p> <p>5 Q. Did you understand at that time of assignment</p> <p>6 that if you and Chee and Auger had not assigned your</p> <p>7 ownership rights in the 841 and the 020 inventions to</p> <p>8 Illumina, each of you might have retained an ownership</p> <p>9 right in those patents?</p> <p>10 MR. COSTAKOS: Objection. Form, foundation,</p> <p>11 competence.</p> <p>12 THE WITNESS: Again, I don't mean to play an</p> <p>13 attorney, but my understanding is Illumina had those</p> <p>14 rights and they could march through whatever they needed</p> <p>15 to do to document the invention.</p> <p>16 BY MR. SHULMAN:</p> <p>17 Q. Okay.</p> <p>18 A. And that I -- if I refused to sign something,</p> <p>19 it would have no bearing on whether Illumina owned it or</p> <p>20 not. That's my understanding. I could be wrong.</p> <p>21 Q. Okay.</p> <p>22 A. You guys are the attorneys.</p>	<p>1 Q. So it was a valuable invention, in your view?</p> <p>2 A. Yes.</p> <p>3 Q. Potentially worth millions of dollars?</p> <p>4 A. What -- most important was that we had a</p> <p>5 product that came out of that brainstorming session, and</p> <p>6 that was fundamentally important for Illumina.</p> <p>7 Q. And so the invention that led to that product</p> <p>8 was very valuable to Illumina?</p> <p>9 A. Well, it's an interesting question because I</p> <p>10 would say that up until this lawsuit, the invention had</p> <p>11 no bearing on the economics of that product. There was</p> <p>12 nobody -- while we had that product on the market, there</p> <p>13 was no real competition for that product. And so having</p> <p>14 a patent or not having a patent had no material impact on</p> <p>15 whether we generated additional dollars worth of revenue</p> <p>16 for Illumina.</p> <p>17 Q. Well, I didn't ask that. But the patent</p> <p>18 applications were considered valuable assets of Illumina.</p> <p>19 Correct?</p> <p>20 A. Patent applications are considered valuable</p> <p>21 assets of Illumina.</p> <p>22 Q. Okay.</p>

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<p>1 A. But it had no bearing on the -- on the economic 2 returns from that product, and that product was 3 fundamentally important to Illumina.</p> <p>4 Q. And so was the invention?</p> <p>5 MR. COSTAKOS: Objection. Form.</p> <p>6 THE WITNESS: Well, you know, the -- and I 7 don't know what the right word is here with -- I'm just 8 struggling because I don't know what implications -- when 9 I agree that something's an invention, if I think of an 10 invention as being what ultimately comes out of a patent 11 application, then that had no bearing on Illumina's 12 ability to gain economic return from its ArrayMatrix 13 product.</p> <p>14 If you regard an invention to encompass the 15 idea that led to a product, then, yes, we generated lots 16 of money on that product. Whether we had the patent or 17 not was immaterial in generating those revenues.</p> <p>18 So that's why I'm tripping up on the term 19 "invention" because I want to be more careful than I was 20 in this February 26, 2001, email where I describe 21 something as an invention.</p> <p>22 BY MR. SHULMAN:</p>	<p>1 hypothetical because none of that happened.</p> <p>2 BY MR. SHULMAN:</p> <p>3 Q. Right.</p> <p>4 A. I think what you're referring to is for 5 somebody -- a potential fourth inventor, which I don't 6 think existed, that was not an Illumina employee --</p> <p>7 Q. Right.</p> <p>8 A. -- that did not have rights to assign, and so 9 it depends on which way you look at that.</p> <p>10 Q. If Illumina had to share the ownership of the 11 applications for the 020 and the 841 with Dr. Kirk, for 12 example, the value of Illumina's ownership interest would 13 be less. Correct?</p> <p>14 MR. COSTAKOS: Objection. Form.</p> <p>15 THE WITNESS: And, again, there was no value to 16 having ownership of the patents. The value to date, 17 other than whatever may come out of this lawsuit, has 18 strictly been based upon the products.</p> <p>19 If we didn't file those patent applications, it 20 would have had no impact on Illumina's ability to 21 generate value from that idea. Zero.</p> <p>22 And so, you know, if we really thought there</p>
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<p>1 Q. Okay. And so the idea that led to what was 2 ultimately the Sentrix ArrayMatrix product is the idea 3 that you conceived in the summer of 1998. Correct?</p> <p>4 A. Correct.</p> <p>5 Q. Okay. And that idea was valuable. As it 6 turned out, you developed a product that sold a lot of 7 money?</p> <p>8 A. Yes, we can agree on those things.</p> <p>9 Q. Okay. And because you and Mr. Chee and 10 Mr. Auger had assigned all of your ownership rights to 11 Illumina, the entire value of the applications for the 12 020 and the 841 was owned solely and exclusively by 13 Illumina as long as you, Chee, and Auger were the only 14 inventors. Correct?</p> <p>15 MR. COSTAKOS: Objection. Form.</p> <p>16 THE WITNESS: Unless there was somebody else 17 obligated, some -- this is all hypothetical. I think if 18 there was a fourth inventor and they were also an 19 Illumina employee or had rights assigned to Illumina for 20 any invention that it wouldn't matter. In terms of 21 Illumina's perspective, they just need to make sure they 22 corrected the inventorship. All of that is strictly</p>	<p>1 was a fourth inventor, the right thing would have been 2 not to even file a patent, if we thought that somehow 3 there would be an obligation to a fourth inventor. I 4 don't believe there was a fourth inventor. I believe 5 we've correctly identified the inventorship. I believe 6 we have done the right things in prosecuting these 7 patents. And whatever you guys want to do -- come out 8 with is fine with me.</p> <p>9 MR. SHULMAN: Okay. Let me repeat my question 10 because I don't think you've answered it.</p> <p>11 BY MR. SHULMAN:</p> <p>12 Q. If Illumina had to share the ownership of the 13 applications for the 020 and the 841 with, for example, 14 Dr. Kirk, then whatever the value of Illumina's ownership 15 interest in those applications was would be less?</p> <p>16 A. Absolutely.</p> <p>17 MR. COSTAKOS: Objection. Asked and answered.</p> <p>18 THE WITNESS: So -- so I'm glad you answered 19 the question again because the answer is absolutely no, 20 because as long as Illumina had freedom to operate as a 21 co-inventor, it would have freedom to operate, then it 22 could produce the products and generate all the revenue</p>

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<p>1 that we were able to from the ArrayMatrix.</p> <p>2 The only case where exclusivity would matter is</p> <p>3 if we were trying to keep somebody else from performing</p> <p>4 the same invention, and that's the subject of this</p> <p>5 lawsuit. And I have no idea whether there's any value</p> <p>6 there or not.</p> <p>7 All I can say is it had no impact. Having</p> <p>8 exclusivity would have had no impact in our ability to</p> <p>9 generate revenue and value from the ArrayMatrix.</p> <p>10 BY MR. SHULMAN:</p> <p>11 Q. Okay. Did there come a time at Illumina when</p> <p>12 you were considering the concepts of using silicon</p> <p>13 chiplets that contain an array of bioactive agents?</p> <p>14 A. Yes, I believe there was.</p> <p>15 Q. Okay. And approximately when did that idea</p> <p>16 arise?</p> <p>17 A. Somewhere -- the idea of using a silica</p> <p>18 substrate happened very early in Illumina's history. I</p> <p>19 believe Steve Auger thought of the idea and -- with help</p> <p>20 from Todd Dickinson in the 1998 standpoint.</p> <p>21 So now I'm trying to get to your other question</p> <p>22 about the chiplets and -- which are -- I assume you mean</p>	<p>1 Q. Okay. And you also attended the meeting,</p> <p>2 didn't you?</p> <p>3 A. I think I did.</p> <p>4 Q. Okay. And this meeting took place on or about</p> <p>5 April 15 of 2004?</p> <p>6 A. Yes.</p> <p>7 Q. And what was the product planning meeting back</p> <p>8 in that time frame?</p> <p>9 A. I think it was a time in which scientists could</p> <p>10 bring to the product advisory committee, the PAC, ideas</p> <p>11 that they had for new products.</p> <p>12 Q. Okay. And at this meeting, one of the new</p> <p>13 products that was being discussed was something called</p> <p>14 the Chiplet ArrayMatrix. Do you see that?</p> <p>15 A. Yes.</p> <p>16 Q. Do you recall that?</p> <p>17 A. Vaguely, yes.</p> <p>18 Q. Okay. And according to this document, it says</p> <p>19 that the Chiplet ArrayMatrix concept is chips on posts.</p> <p>20 Do you see that?</p> <p>21 A. Yes.</p> <p>22 Q. And it's further described as bonding one</p>
<p style="text-align: center;">Page 278</p> <p>1 what I think you mean, which is to make small, little</p> <p>2 chips that you might glue to the surface of an</p> <p>3 ArrayMatrix or something like that.</p> <p>4 I think that idea probably surfaced in 2000,</p> <p>5 2001, but I -- you know, I just remember it happened.</p> <p>6 MR. SHULMAN: Okay. Let me see if I can</p> <p>7 refresh your recollection.</p> <p>8 What are we up to? Exhibit 22.</p> <p>9 Let me mark as Exhibit 22 some April 15, 2004,</p> <p>10 product planning meeting notes produced by Illumina with</p> <p>11 production No. 3024965.</p> <p>12 (Exhibit 22 was marked.)</p> <p>13 BY MR. SHULMAN:</p> <p>14 Q. Take whatever time you need to --</p> <p>15 A. Okay.</p> <p>16 Q. -- review the document, at least briefly. And</p> <p>17 then if you need to review it in greater detail, you can.</p> <p>18 Do you see -- first of all, did you receive a</p> <p>19 copy of this memo or these minutes from Aaron Jones on or</p> <p>20 about the date that they bear?</p> <p>21 A. The only reason that I would think I would is</p> <p>22 because I'm in the sub- -- in the "to" line.</p>	<p style="text-align: center;">Page 280</p> <p>1 chiplet to the end of each of 96 posts.</p> <p>2 A. Yes.</p> <p>3 Q. Do you see that?</p> <p>4 A. Yes.</p> <p>5 Q. And it's described as a marriage of the</p> <p>6 BeadChip and Sentrix ArrayMatrix concepts.</p> <p>7 A. Yes.</p> <p>8 Q. Do you see that?</p> <p>9 Can you explain to me how it's a marriage of</p> <p>10 those two concepts?</p> <p>11 A. The idea that you could use a bead array with a</p> <p>12 different substrate --</p> <p>13 THE REPORTER: I'm sorry?</p> <p>14 BY MR. SHULMAN:</p> <p>15 Q. I'm sorry. Say that again. Two of us didn't</p> <p>16 get it.</p> <p>17 A. Again, I'm interpreting somebody else's notes</p> <p>18 here, but I think what that person meant, although you're</p> <p>19 fine to go talk to that person personally, was that the</p> <p>20 idea that was proposed as a product was that you could</p> <p>21 combine the bead array platform in the ArrayMatrix using</p> <p>22 the silica substrate instead of using the fiber bundle</p>

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<p>1 substrate.</p> <p>2 Q. Okay. The chiplet that's referred to here, is</p> <p>3 that a planar silicon chip?</p> <p>4 A. My understanding of it would be -- would be a</p> <p>5 diced small piece of silica. I guess you could call it</p> <p>6 planar, but, again, it's going to undulate with the wells</p> <p>7 because it would have had the wells already etched into</p> <p>8 the surface.</p> <p>9 Q. Was this chiplet going to be used with beads?</p> <p>10 A. Yes.</p> <p>11 Q. So it was a planar surface, a chip into which</p> <p>12 you etched wells for beads, and then you contemplated</p> <p>13 putting the beads in those wells?</p> <p>14 A. Yes.</p> <p>15 Q. And each of those chiplets were going to be</p> <p>16 bonded to one end of a post, according to this?</p> <p>17 A. According to this, yes.</p> <p>18 Q. No. 2 says "Chiplet might be LCA or another</p> <p>19 BeadChip product." Do you see that?</p> <p>20 A. I see that.</p> <p>21 Q. What does LCA stand for?</p> <p>22 A. I can't remember right now.</p>	<p>1 points, and then let's take just a quick break and see</p> <p>2 whether I -- whether I have any follow-up.</p> <p>3 As far as the invention disclosure, I'll look</p> <p>4 into that. I don't know which of those categories it</p> <p>5 falls into, but I'll get back to you on that.</p> <p>6 As far as the business plan, it's certainly not</p> <p>7 being withheld on any grounds, so to -- best of my</p> <p>8 information, if we have it, we've produced it, but I'll</p> <p>9 have someone double-check on that.</p> <p>10 MR. SHULMAN: And I'll be very upfront with you</p> <p>11 about why I'm interested in it.</p> <p>12 In the copy, the draft that we looked at</p> <p>13 earlier, which is Exhibit 5 --</p> <p>14 MR. COSTAKOS: Uh-huh.</p> <p>15 MR. SHULMAN: -- and this was handed out to</p> <p>16 strangers from the corporation -- there are sections that</p> <p>17 are redacted. And I can understand why you might redact</p> <p>18 a draft because it could go to a lawyer or what have you.</p> <p>19 But these sections seem to suggest that they talked about</p> <p>20 IP and various things. And to the extent that was</p> <p>21 disclosed to third parties, as undoubtedly it was if you</p> <p>22 didn't have a non-confidential version, we want to see</p>
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<p>1 MR. SHULMAN: From the -- I think I'm just</p> <p>2 about done, but I want to ask you a couple of things on</p> <p>3 the record.</p> <p>4 The invention disclosure form that he referred</p> <p>5 to earlier today -- oh, I'm sorry.</p> <p>6 The invention disclosure form that</p> <p>7 Dr. Stuelpnagel referred to earlier today, I know it</p> <p>8 hasn't been produced. I don't know if it was overlooked</p> <p>9 or whether you're choosing to withhold it as privileged,</p> <p>10 but we need that document if you're willing to produce</p> <p>11 it, or we need to find out whether or not you're willing</p> <p>12 to produce it.</p> <p>13 And the final business plan, we don't have that</p> <p>14 either, which is an important document, and we need that.</p> <p>15 There may be other things we need that I don't</p> <p>16 know about, but those are the two that I can think about.</p> <p>17 Subject to resolving those two discovery</p> <p>18 issues, I have no further questions at this point.</p> <p>19 Should we get the documents, I may have, you</p> <p>20 know, half an hour's worth of examination just to touch</p> <p>21 on those two topics, but other than that, I'm done.</p> <p>22 MR. COSTAKOS: Okay. Let me respond to your</p>	<p>1 what the final plan said because that's the one that went</p> <p>2 out the door. This one obviously didn't because it's</p> <p>3 still a draft.</p> <p>4 And so we haven't challenged your redactions</p> <p>5 here because it's draft and God knows who you showed it</p> <p>6 to, and maybe there's lawyers' advice all over these</p> <p>7 pages. I don't know.</p> <p>8 But the final one we're plainly interested in</p> <p>9 in an un-redacted form. So those are the two bullet</p> <p>10 point areas that I'm interested in.</p> <p>11 And if we're able to make progress on that, I</p> <p>12 may have a few more questions for him at some future</p> <p>13 date, but other than that, I'm done.</p> <p>14 MR. COSTAKOS: Okay. Well, we'll see what we</p> <p>15 can do about that.</p> <p>16 So let's take a short break and then we'll come</p> <p>17 back.</p> <p>18 (Discussion off the record.)</p> <p>19 MR. SHULMAN: Off the record at 4:42.</p> <p>20 (Recess.)</p> <p>21 VIDEOGRAPHER: We're on the record at 4:51 p.m.</p> <p>22</p>

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<p>1 EXAMINATION 2 BY MR. COSTAKOS: 3 Q. Dr. Stuelpnagel, you testified a couple times 4 today about how the notion that you derived the invention 5 from Dr. Kirk was inconsistent with your recollection of 6 the brainstorming meeting. Can you explain what you mean 7 by that? 8 MR. SHULMAN: I object to the form of the 9 question. 10 Go ahead. 11 THE WITNESS: Well, there's a number of 12 elements to that. The first is my recollection of what 13 initiated the brainstorming session, which was out 14 running and thinking about how these arrays were really 15 fundamentally different than what Affymetrix and other 16 people were doing. 17 And I realized that by itself isn't the 18 invention, but the concept of putting the array into 19 something as opposed to putting the solution onto the 20 array was really unique and different embedded in Walt's 21 technology. And that's the kernel that I taught -- took 22 back with me to the brainstorming session with Mark Chee</p>	<p>1 that the Kirk email had any influence at all in how we 2 came up with the ArrayMatrix. 3 BY MR. COSTAKOS: 4 Q. What do you recall about Mr. Auger and 5 Dr. Chee's reaction at the brainstorming session? 6 A. My recollection is everybody was similarly 7 excited, that we thought we had fundamentally figured out 8 something that was going to be important from a product 9 standpoint and that this really gave us a lot of meat to 10 what became our business plan. It was a big part of our 11 business plan. 12 Q. You saw an exhibit earlier today from February 13 of 2001 where Dr. Kirk, through Bryan Roberts -- strike 14 that. Let me move back. 15 You saw an email earlier today from Bryan 16 Roberts where Dr. Kirk had suggested that he was an 17 inventor or at least that he was the source, let's say, 18 of the oligo decoding technology that Illumina was using. 19 You recall that email generally? 20 A. I do. 21 Q. From 2003? 22 A. Yes.</p>
<p>1 and Steve Auger. 2 And from that, we came up with the idea of the 3 ArrayMatrix, and we were all really excited. We thought 4 it was novel. And the reason why we were excited is 5 because we thought we had invented -- or came up with the 6 idea. I won't say invented, but came up with the idea of 7 what Illumina's first products were going to be. 8 And if this was simply reading someone else's 9 email and then making a further transition from that to 10 what became the ArrayMatrix, we wouldn't have had that 11 kind of excitement, and I wouldn't have had the 12 recollection that I had where this whole thing was 13 stimulated by a run and me thinking that the arrays at 14 Walt's are different. 15 And clearly the other people thought that the 16 arrays were different. David Walt thought it. And 17 clearly in that email Greg Kirk had thought how the 18 arrays were different, that you could actually 19 interrogate a well on a microtiter plate. But the fact 20 that I had developed that -- what I think -- what I 21 recall is in- -- independently as the kernel to the 22 brainstorming session is consistent with me not thinking</p>	<p>1 Q. Did Dr. Kirk ever come to you, to your 2 knowledge, and say, "I'm the inventor of the SAM 3 product"?</p> <p>4 A. No, he did not.</p> <p>5 MR. SHULMAN: I'm sorry. Of the?</p> <p>6 MR. COSTAKOS: SAM product.</p> <p>7 THE WITNESS: Just for clarification, SAM is an 8 abbreviation that we used at Illumina for Sentrix 9 ArrayMatrix. And, no, Dr. Kirk never came to me to 10 suggest that he was an inventor of that product.</p> <p>11 BY MR. SHULMAN:</p> <p>12 Q. After the Sentrix ArrayMatrix product was 13 introduced, he never came to you?</p> <p>14 A. No, he did not.</p> <p>15 Q. Did he ever follow up with you on the -- after 16 the email exchange in 2001, to your knowledge?</p> <p>17 A. No. I thought that he realized everything was 18 resolved and everything was fine.</p> <p>19 MR. COSTAKOS: I have no further questions.</p> <p>20 MR. SHULMAN: I have nothing.</p> <p>21 Thank you very much for your time. We may or 22 may not see you again.</p>

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<p>1 VIDEOGRAPHER: There is the end of disk No. 3 2 of Volume I. It concludes the deposition. 3 We're off the record at 4:56 p m. 4 (The deposition concluded at 4:56 p m.) 5 * * * 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22</p>	<p>1 John R. Stuelpnagel c/o 2 Foley & Lardner 3 777 East Wisconsin Avenue 4 Milwaukee, Wisconsin 53202-5306 5 Case: Illumina v. Affymetrix - 6 Date of deposition: 07/13/10 7 Deponent: John R. Stuelpnagel 8 Please be advised that the transcript in the above 9 referenced matter is now complete and ready for signature 10 The deponent may come to this office to sign the transcript, 11 a copy may be purchased for the witness to review and sign, 12 or the deponent and/or counsel may waive the option of signing 13 Please advise us of the option selected 14 Please forward the errata sheet and the original signed 15 signature page to counsel noticing the deposition, noting the applicable 16 time period allowed for such by the governing Rules of Procedure 17 If you have any questions, please do not hesitate to call our office at 18 (202)-232-0646 19 Sincerely, 20 21 Digital Evidence Group 22 Copyright 2009 Digital Evidence Group 22 Copying is forbidden, including electronically, absent express written consent</p>
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<p>1 2 REPORTER'S CERTIFICATE 3 4 I, Veronica S. Thompson, Certified Shorthand 5 Reporter for the State of California, do hereby certify: 6 That the witness named in the foregoing 7 deposition was by me duly sworn; that the deposition was 8 then taken before me at the time and place herein set 9 forth; that the testimony and proceedings were reported 10 stenographically by me and were transcribed through 11 computerized transcription by me; that the foregoing is a 12 true record of the testimony and proceedings taken at 13 that time; and that I am not interested in the event of 14 the action. 15 Witness my hand dated July 14, 2010. 16 17 18 19 _____ 20 Veronica S. Thompson 21 CSR 6056, RPR, CRR 22</p>	<p>1 Digital Evidence Group, L.L.C. 2 1111 16th Street, Northwest, Suite 410 3 Washington, D.C. 20036 4 (202) 232-0646 5 6 SIGNATURE PAGE 7 8 Case Name: Illumina v. Affymetrix - 9 Witness Name: John R. Stuelpnagel 10 Deposition Date: 07/13/10 11 I do hereby acknowledge that I have read 12 and examined the foregoing pages 13 of the transcript of my deposition and that: 14 () The same is a true, correct and 15 complete transcription of the answers given by 16 me to the questions therein recorded. 17 () Except for the changes noted in the 18 attached Errata Sheet, the same is a true, 19 correct and complete transcription of the 20 answers given by me to the questions therein 21 recorded. 22 _____ 22 DATE WITNESS SIGNATURE</p>

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5

ERRATA SHEET

6

7

8 Case Name: Illumina v. Affymetrix -

9 Witness Name: John R. Stuelpnagel

10 Deposition Date: 07/13/10

11 Page No. Line No. Change

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Signature

Date